THE TRIAL OF JAMES CARNEGIE of *Finhaven*,

BEFORE

The COURT of JUSTICIARY,

At EDINBURGH, in the Year 1728,

Indicted for the Murder of the Earl of *Strathmore*.

The THIRD EDITION.

EDINBURGH:
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Curia Juſticiaria S. D. N. *Regis, tenta in novo Seſſionis Domo Burgi de* Edinburgh, *decimo quinto die menſis* Julii, *Milleſimo ſeptingenteſimo vigeſimo octavo, per honorabiles Viros* Adamum Cockburne *de* Ormiſtoun, *Juſticiarium Clericum, Dominos* Jacobum Mackenzie *de* Royſtoun *et* Gulielmum Calderwood *de* Poltoun, *Magiſtrum* Davidem Erſkine *de* Dun, *Dominum* Gualterum Pringle *de* Newhall, *et Magiſtrum Andream Fletcher de* Miltoun, *Commiſſionarios Juſticiariæ dict.* S. D. N. *Regis.*

Curia legitime affirmata.

Intran.

JAMES CARNEGIE of Finhaven, priſoner in the tolbooth of Edinburgh, pannel, indicted and accuſed at the inſtance of Suſanna Counteſs of Srathmore, and Mr James Lyon, brother-german and neareſt of kin to the deceaſt Charles Earl of Strathmore, with concourſe and at the inſtance of Duncan Forbes Eſq; his Majeſty's Advocate, for his Highneſs's intereſt, for the crime of WILFUL and PREMEDITATE MURDER committed by him upon the perſon of the ſaid Charles Earl of Strathmore, as is more fully mentioned in the indictment raiſed againſt him thereanent, which is as follows: " James Carnegie of Finhaven, now priſoner in the tolbooth of Edinburgh, you are indicted and accuſed at the inſtance of Suſanna Counteſs of Strathmore, and Mr James Lyon, brother-german and neareſt of kin to the deceaſt Charles Earl of Strathmore, with concourſe and at the inſtance of Duncan Forbes Eſq; his Majeſty's Advocate, for his Highneſs's intereſt: THAT WHERE, by the laws of God, the law of Nature, the common law, and the municipal law,

" and practice of this kingdom, as well as the laws
" of all well governed realms, WILFUL and PRE-
" MEDITATE MURDER, and all MURDER and HO-
" MICIDE, or being art and part thereof, are moſt
" atrocious crimes, and ſeverely puniſhable; *yet*
" *true it is and of verity*, That you have preſumed
" to commit, and are guilty, actor, or art and part,
" of all, or one or other of the foreſaid horrid
" crimes: IN SO FAR AS, having a cauſeleſs ill-will
" and reſentment againſt the deceaſt Charles Earl of
" Strathmore, you conceived a deadly hatred and
" malice againſt him; and ſhaking off all fear of
" GOD and Regard to the foreſaid laudable laws, on
" Thurſday the ninth of May, in this preſent year
" one thouſand ſeven hundred and twenty-eight, or
" one or other of the days of the ſaid month, a-
" bout the hour of eight or nine of the night of
" that day, or ſome other hour of that day or night,
" upon the ſtreet of the town of *Forfar*, within the
" county of *Forfar*, you did, with a drawn ſword,
" or ſome other offenſive or mortal weapon,
" without the leaſt colour or cauſe of provocati-
" on then given by him, invade the ſaid deceaſt
" Earl, who had no weapon in his hand, and did
" baſely and felonioufly murder and kill him, by
" giving him a wound therewith in the belly, ſome
" inches above the navel, which, by following the
" thruſt with a ſecond puſh, went through the in-
" teſtines and the back, a little lower than where
" the ſaid weapon entered the belly: Of which wound,
" after great Pain, on Saturday immediately thereaf-
" ter, or in ſome ſhort ſpace thereafter, he died; and
" ſo was cruelly and barbarouſly murdered by you.
" AT LEAST, at the time and place above mentioned,
" with a drawn ſword, or ſome other mortal weapon,
" without any juſt cauſe or provocation, you gave
" the ſaid deceaſt Charles Earl of Strathmore a

" wound

" wound in the belly, which reached through the " inteſtines and back, wherethrough he ſoon after " fell down and died at the time foreſaid. AT " LEAST, at the time and place above deſcribed, " the ſaid Charles Earl of Strathmore was with a " drawn ſword, or ſome other deadly weapon, fe- " loniouſly and barbarouſly wounded, and of the " ſaid wound died within a few days thereafter; " and you were art and part in his murder. By all " which it is evident, " That you are guilty, art and " part of the crimes of " WILFUL and PREMEDITATE " MURDER and HOMICIDE, or one or other of them, at " the time and place, and in the manner above ſet " forth. And which facts, or part thereof, or your " being art and part of any of the ſaids crimes, being " found proven by the verdict of an aſſize, in preſence " of the Lords Juſtice-General, Juſtice-Clerk, and " Commiſſioners of Juſticiary, you ought to be ex- " emplarily puniſhed with the pains of law, to the " terror of others to commit the like in time coming."

Purſuers.

Mr Duncan Forbes, his Majeſty's Advocate.
Mr Charles Areſkine, Solicitor.
Mr Alexander Hay Advocate.
Mr Patrick Grant Advocate
Mr George Ogilvy Advocate.
Mr John Ogilvie Advocate.
Mr Hugh Dalrymple Advocate.

Procurators in defence.

Mr Robert Dundas Advocate.
Mr James Fergusſon ſenior Advocate.
Mr John Forbes Advocate.
Mr William Grant Advocate.
Mr James Paterſon Advocate.
Mr George Smollet Advocate.

The libel being openly read in court, and debate *viva voce*, in preſence of the Lords; they ordained both parties to give in their informations to the Clerk of court, in order to be recorded; the Purſuers to give in theirs againſt Saturday next, and the Pannel's procurators to give in his againſt Friday thereafter: And continued the cauſe to the firſt day of Auguſt next to come, at nine o'clock morning; and ordained witneſſes and aſſizers to attend at that time, each perſon, under the pain of law; and ordained the pannel to be carried back to priſon; and granted ſecond diligence for the purſuers, againſt the witneſſes.

INFORMATION for *Suſanna* Counteſs of *Strathmore*, and Mr *James Lyon*, brother-german to the deceaſt *Charles* Earl of *Strathmore*, and his Majeſty's Advocate for his Highneſs's intereſt;

AGAINST

JAMES CARNEGIE of *Finhaven*, Pannel.

THE ſaid James Carnegie is indicted and accuſed, as guilty, art and part of WILFUL and PREMEDITATE MURDER; at leaſt of MURDER and HOMICIDE: *In ſo far as*, upon the ninth of May laſt, upon the ſtreets of Forfar, with a drawn ſword, he wounded the deceaſt Charles Earl of Strathmore in the Belly, ſome inches above the navel; which wound went through the inteſtines and the back, a little lower than where the ſaid weapon entered the belly; of which wound he died ſoon after.

THE indictment, in the firſt place, charges the fact, as proceeding from a cauſeleſs ill-will and reſentment

ment the pannel had conceived againſt the defunct, who, at the time the wound was given, had done nothing that could be pretended as a colour or cauſe of provocation: And a circumſtance is noticed, from which it may be inferred, that there was deadly hatred and malice; namely, that after one puſh there was a ſecond, whereby the wound went quite through his body.

THERE is a ſecond branch of the indictment, in which the circumſtance of *premeditate malice* and *forethought Felony* needed not to be libelled; and he is charged only with *Murder* or *Homicide*, as ſeparately relevant. And laſtly, art and part is charged upon him.

AT calling before the Lords of Juſticiary, againſt the firſt branch of the indictment it was excepted, "That the indictment was too general, particular "circumſtances not being expreſt from which the "cauſeleſs ill-will or reſentment mentioned, and fore-"thought and premeditate malice could be inferred, "whereby the pannel was deprived of the benefit "due to all pannels, when tried for their life, to "exculpate himſelf, by ſhewing, that if at any time, "prior to the time mentioned in the indictment, "there was any appearance of grudge or quarrel "between the defunct and him, there was an after-"reconciliation and entire friendſhip: *And it was ſaid*, "That general libels ought not to be ſuſtained".

To this it was anſwered, That a previous grudge is charged, and that the deceaſt was invaded without the leaſt colour or cauſe of provocation; which is the ſtrongeſt evidence of forethought, eſpecially when joined with this other particular, that the firſt thruſt was followed with a ſecond puſh, which was a mark of inveterate and relentleſs malice; and that it was ſufficient to charge a previous quarrel in general, which would be made appear by the proof. Nor will

it

will it be found, that in libels of forethought felony, it is uſual or neceſſary to libel all the circumſtances from which the forethought may be preſumed, eſpecially when the *ſpecies facti* is charged in that manner, as affords the preſumption of *forethought*, ſetting forth, That the wound was given without the leaſt colour or cauſe of provocation on the part of the defunct at that time. Neither can it be thought unfair with regard to the pannel, who if he had any relevant ground of exculpation, would have acceſs to prove friendſhip with the defunct, to take off any charge of precedent quarrels, whereof he could not be ignorant. And ſtill there muſt be leſs ground of complaint, where no good reaſon of exculpation is offered, whereby the pannel can be allowed to adduce proof, which 'tis believed is, without contradiction, the caſe upon the firſt branch of the libel.

As to the two laſt branches of the indictment, it was alledged, " That ſeveral circumſtances attending " the fact complained of were concealed, which, when " opened, afforded the pannel plain and obvious de- " fences ; *and therefore it was informed*, That the " pannel, a perſon diſpoſed to peace, and in entire " friendſhip with the defunct, chanced to be in com- " pany with him about the time charged in the in- " dictment, with one *John Lyon* of *Bridgeton*, and " others : That *Bridgeton* gave him the higheſt pro- " vocation, not only by words, but by proceeding " ſo far, as to throw him into a kennel, where the " pannel was in hazard of periſhing, being extreme- " ly drunk : That getting up, heated with liquor, " and ſo extremely provoked, he drew his ſword, " and purſued *Bridgeton*, and that the defunct thruſting " himſelf between them, caſually received the thruſt " aimed at another."

From theſe circumſtances, it was pled for the pannel, " That if he did kill the defunct, it was a mere " miſadventure,

" miſadventure, rather a misfortune as a fault, and " in no event could ſubject him to the *pœna ordinaria*; " for that, 1*mo*, in theſe circumſtances had he killed " the ſaid *John Lyon* of *Bridgeton*, the pain of death " could not have been inflicted either by the law of " God, the common law, nor by the municipal law " of this kingdom, neither by the laws of other " well governed realms; particularly by the laws of " our neighbouring nation, in regard the fact was " done of ſuddenty, by a perſon in drink, and highly " provoked."

And 1*mo*, As to the law of God, *chap.* xxi. *verſe* 13. of *Exodus* was appealed to, where it is ſaid, *That if a man ly not in wait, there was to be a place appointed whether he ſhould fly*; which ſeemed to require forethought. And the xxxv. *chap.* of *Numbers. verſe* 22. where it was ſaid, *That if any one thruſt another ſuddenly without enmity, the congregation was to judge between the ſlayer and the revenger of blood*; from which it would ſeem, that ſlaughter of ſuddenty was not puniſhable by death.

To this it was anſwered, That in the law of God the general rule was, *Whoſo ſheddeth man's blood, by man ſhall his blood be ſhed: And at the hand of man, and at the hand of every man's brother, and at the hand of every beaſt was the life of man to be required*, Gen. *chap.* ix. That by the law of *Moſes*, death of a ſuddenty was plainly capital; nor had the manſlayer the benefit of the city of refuge, but where the ſlaughter was mere misfortune and caſual, which was plainly the meaning of the words in *Exodus*, *If a man ly not in wait, but God deliver him into his hand*; which could not with any propriety be underſtood of ſlaughter committed, where the intention and deſign *antecedit ictum licet non congreſſum*.

And

And this matter is clearly explained in the xxxv. *chap.* of *Numbers*, where *he who ſmites with an inſtrument of iron is called a* MURDERER; and where it is ſaid, *That he who ſmites with a throwing ſtone, or with a hand-weapon of wood, wherewith a perſon may die, and he die, the murderer is ſurely to be put to death.* And then the law proceeds plainly to treat of caſes where death enſues from ſtrokes or thruſts of a weapon not deadly, and there it requires indeed hatred and enmity; but if it be done ſuddenly and without enmity, or (which is remarkable) in the 23d *verſe*, *With any ſtone wherewith a man may die, ſeeing him not, and was not his enemy, nor ſought his harm; then the congregation was to judge between the ſlayer and the revenger of blood.* From which 'tis plain, that ſlaughter upon ſuddenty, even without forethought or previous enmity, was capital by the law of *Moſes*, if the wound was given with a lethal weapon, except when it was done by mere chance, *as by throwing a ſtone whereby a man may die, the perſon who threw it ſeeing him not, and ſo at no time was his enemy, or ſought his harm.* And this is the caſe mentioned, *chap.* xix. *verſe* 4. *Deut.* where it is ſaid, *Whoſo killeth his neighbour ignorantly, whom he hated not in time paſt* (which is limited by the example immediately ſubjoined to homicide merely caſual) *ſhall fly into one of theſe cities and live.* Now, in the preſent caſe, the nature of the weapon and of the wound are ſuch, as clearly exclude founding with any colour upon the diſpoſition of the law of *Moſes*, though the queſtion were of the pannel's claiming the benefit of the city of refuge. But neither is it an argument of any force to plead, that where the benefit of the city of refuge was granted, that by the law of nature the crime was not capital; for the revenger of blood could never have been tolerated to kill without the city of refuge, where innocent blood was ſpilt, whereby the land muſt have been polluted

polluted, and the ſubjects were permitted *impune*, ſo notoriouſly to break in upon the eſtabliſhed laws of nature; and therefore, though it is an argument of unavoidable force, that whereever by the law of *Moſes* capital puniſhments are allowed, ſuch puniſhments are lawful: But the argument is not of equal ſtrength, that where the powers of the law were ſuſpended by the *jus aſyli* eſtabliſhed by poſitive precept, that therefore, in countries where there is no ſuch privilege, either by the laws of God, or the laws of the land, that there the puniſhment is not to be capital, where the *jus aſyli* could have been claimed.

2*do*, It was contended, "That by the common law, not "only *dolus*, but *propoſitum* was neceſſary; "and that ſlaughter committed *impetu et rixa* were "not to be puniſhed capitally." And to this purpoſe the authority of the learned *Voet.* was cited, who ſeems to ſay, *That* in rixa, *if the perſon cannot be diſcovered who gave the deadly wound, the ordinary puniſhment ſhould not take place.*

But when this matter is conſidered, it is plain there ariſes no good argument for the Pannel from the common law: For though there is a difference to be made between *propoſitum* and *machinatio præmeditata*, and ſudden paſſion and heat of drink, determining the will to commit the crime; yet as laws were made and became neceſſary, chiefly from the depraved paſſions of mankind, they cannot afford a ſufficient excuſe againſt the ordinary puniſhment of an atrocious crime; and there is *dolus*, when a crime is even committed of a ſudden, although there be no forethought: ſo it is commonly ſaid, that opportunity makes the thief, and theft is committed *impetu*, nevertheleſs not without dole. Nor is it neceſſary to prove or libel a forethought in the commiſſion of the crime. In the ſame manner paſſion or provocation may unfortunately determine the will to the com-

miſſion of a horrid crime, but it would be of dangerous conſequence to allow of bloodſhed under colour of paſſions which men ought to ſubdue, or of drunkenneſs which they ought to avoid, or of a ſudden vicious turn of mind; and therefore, in the Roman Law, whoever committed ſlaughter *dolo malo*, whether deliberately and upon forethought, or of ſuddenty, was to be puniſhed *ex lege Cornelia de Sicariis:* And to ſhow that it was ſufficient, that the deſign ſhould only precede the act from which death followed, and not the meeting of the perſons, as the acts of the mind are only to be known by external circumſtances; the kind of weapon, in the ſame manner as in the law of *Moſes*, was ſufficient to found a preſumption of ſuch *propoſitum*, as, joined with the act of killing, brought the Manſlayer under the *pœna legis Corneliæ:* ſo in the *l.* 1. § 3. *ff. ad legem Corneliam de Sic.* it is ſaid, *Si gladium ſtrinxerit, & in eo percuſſerit, indubitate occidendi animo id eum admiſiſſe*; and if prior forethought had been neceſſary, the kind of weapon could not poſſibly have founded a ſufficient preſumption; but as it manifeſtly made appear the intention to kill, whether that intention had its birth from paſſion or drink, it was voluntary ſlaughter, done *dedita opera*, and therefore to be puniſhed capitally. And the paſſage cited from the learned *Voet.* rather confirms this doctrine, That if *in rixa*, which muſt ſuppoſe ſuddenty, the perſons who inflicted the mortal wound was diſcovered, he was to be ſubjected to the ordinary puniſhment. And the ſame author, § 9. of that title obſerves, That tho' ſuch as commit ſlaughter, *calore iracundiæ*, may be ſaid *impetu delinquere*; yet there *neque judicium, neque aſſenſus animi, neque voluntas deſt*; and ſays, *That a Perſon provoked by verbal injuries, how great ſoever, was not free from the* pœna ordinaria. And the truth is, if paſſion and provocation were ſufficient to excuſe ſlaughter, it were in vain to lay down the rules

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ſo anxiouſly conceived in the laws concerning the *moderamen inculpatæ tutelæ*, where the ſlayer muſt prove that he was *conſtitutus in periculo vitæ*. And had the caſe ſtood otherwiſe in the *Roman* Law, it could never have been doubted, when jealouſy was the rage of a man, and adultery the higheſt provocation againſt a huſband, and a real injury; the queſtion could never have been ſtated to be determined by the Emperor, as in *l.* 38. *ff.* § 8. *ad legem Juliam de adult.* Whether a huſband, *impetu tractus doloris, uxorem in adulterio deprehenſam interfecerit*, was liable to the *pœna legis Corneliæ de Sicariis*? And who, by that deciſion, upon the peculiar circumſtances of the caſe, was exeemed, and nevertheleſs made ſubject, *ſi loci humilis*, of being condemned *ad opus perpetuum*, and if *honeſtior* was to be condemned *relegari in inſulam*. But as the caſe muſt be determined upon the law of *Scotland*, it is unneceſſary to dwell too long upon the arguments drawn from the *Roman* Law.

3tio, It was contended for the Pannel, "That by "the law of *Scotland* ſlaughter and murder were of "old different ſpecies of crimes, and only murder "committed upon forethought felony was properly "computed *Murder*, and puniſhed as ſuch; but that "ſlaughter committed upon ſuddenty, or *chaud melle*, "and *in rixa*, was deemed only *homicidium culpoſum*, "and not puniſhable by death." And to ſupport this poſition, ſeveral acts of Parliament were appealed to, by which it was ſtatuted, That murder was to be capitally puniſhed; but *chaud melle*, or ſlaughter committed upon ſuddenty, was to be puniſhable according to the old laws: And that in this caſe, if the Pannel had even killed *Bridgeton*, at whom he aimed the thruſt, in the circumſtances above ſet forth, it was not murder upon forethought, but upon Suddenty and high provocation.

To this it was anſwered, That this doctrine, ſo directly contrary to the received opinion, had little

countenance

countenance from the old laws and acts of Parliament, leſs from the conſtant practice before the act of Parliament King *Charles* II. in the year 1661, and ſtood in plain contradiction to this laſt law, and the conſtant practice and repeated deciſions of the Court of Juſticiary from that time down to this day.

By the old law, particularly *Chap.* 3. of the firſt Statutes of King *Robert* I. intitled, *Men condemned to the death ſhould not be redeemed*, IT IS STATUTED AND ORDAINED, GIF ANY MAN, IN ANY TIME COMING OR BYGANE, IS CONVICT OR ATTAINTED OF *Slaughter*, REIF, OR ANY OTHER CRIME TOUCHING LIFE AND LIMB, " COMMON JUSTICE SHALL BE " DONE UPON HIM, WITHOUT ANY RANSOME." Here *Slaughter* in general is mentioned, and juſtice was to be done upon the perſon convict of it, and the puniſhment by the title was plainly death: So that at common law, Slaughter in general was capital. The next paragraph does indeed ſave the King's power, (which muſt be the power of pardoning) and the liberties granted by the King to the Kirk and Kirkmen, and other Lords; which muſt be underſtood of ſpecial immunities in the caſe of Manſlaughter: For no privilege was to protect againſt murder upon forethought; and the exception confirms the rule.

By *Chap.* 43. of the Statutes of King *Robert* III. it is ſtatuted, THAT NA MAN USE ANY DESTRUCTION, HERSHIPS, BURNING, REIF, *Slaughter*, IN TIME TO COME, UNDER THE PAIN OF TINSEL OF LIFE AND GOODS: Whereby the pain of death is clearly made the puniſhment of Slaughter in general. And in the immediate ſubſequent Chapter, the Sheriff was to take dilligent inquiſition of deſtroyers of the country, or ſuch as had deſtroyed the King's lieges with Herſhips, *Slaughter*, *&c.* and was to take bail from them, if arreſted, to compear at the next Juſtice-ayr; and if bail was not given, the Sheriff was

was to put him to the knowledge of an aſſize: *And gif he be taynt with the aſſize for ſick an treſpaſſour*, it is ſaid, HE SHALL BE CONDEMNED TO DEATH: Which ſeems only to relate to Manſlaughter, and not to murder upon forethought felony, which was one of the pleas of the Crown, to be tried only before the King's Juſticiar; as is evident from *Chap.* 11. King *Malcolm* II.'s Laws, and *Chap.* 13. and 15. whereas ſlaughter might be tried by the Sheriff, where there was a certain accuſer, as appears from *Book* I. of the *Regiam Majeſtatem*, *Chap.* 1 § 7, 8, 9.

THERE are ſundry others of the old Statutes, that ſeem plainly to preſuppoſe that Slaughter was capital, and particularly theſe of *Alexander* II. *Chap.* 2. § 3, 4, 5, 6. And ſo *Skene*, in his treatiſe of crimes, *Tit.* 2. *Chap.* 6. ſays, *That Slaughter* in rixa, *or* chaud melle, *is generally puniſhed by death, and confiſcation of the moveable goods pertaining to the Treſpaſſour; but with this difference, that the Girth or Sanctuary was no refuge to him who commits Slaughter by forethought Felony, but he ſhould be delivered to the Judge Ordinary, to underly the Law:* Which plainly appears from *Act* 23. *Parl.* 4. *James* V. whereby maſters of Girth are ordained to deliver up ſuch perſons as are guilty of murder upon forethought felony. And it is in vain to found upon *Law* 90. *Parl.* 6. *James* I. which ſays in the end, GIF IT BE FORETHOUGHT FELONY, HE SHALL DIE THEREFORE; becauſe the act relates to all Manſlayers; and tho' that particular and moſt atrocious ſpecies be mentioned, as that for which the Murderer ſhould die, yet the argument will not hold, That therefore no other kind of Slaughter was capital: For it is there ſaid in the general, That if the *Slayer* is taken with red hand, the law ſhall be done upon him within that ſun; which cannot be underſtood of a crime not capital. And Sir *George Mackenzie*, in his obſervations upon it, ſays, *This may*

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ſeem to imply, that men die not for murder committed without forethought Felony; but this holds not in our law, for murder, tho' committed without forethought Felony, is puniſhable by death, except it was either caſual, or in ſelf-defence.

The *Act* 51. *Parl.* 3. *James* I. was improperly founded on by the Pannel's Procurators; for that act does no more than extend the difference between forethought Felony and *chaud melle* to all tranſgreſſions as well as ſlaughter; as Sir *George Mackenzie* obſerves upon that law, where he ſays, That *chaud melle*, or *homicidium in rixa commiſſum*, is capital by our preſent law.

THAT Criminals who reſorted to, and took ſanctuary in Churches, had protection, though their crimes were capital, is extremely plain from *Chap.* 6. of the Statutes of K. *Alexander* II. where it is ſaid, *That thieves and reivers who fly to haly Kirk, if moved with repentance, he confeſs that he has havily ſinn'd, and for the love of God is come to the houſe of God for ſafety of himſelf, he ſhall have peace in this manner, That he ſhall not loſe his life nor limb, but reſtore what he had taken, and ſatisfy the King, and ſwear upon the Evangel, That for thereafter, they ſhall never commit reif nor theft; but if he declared himſelf innocent, he was to be try'd.* And in the laſt Paragraph of that *Chap.* it is ſaid, "*Moreover Manſlayers*, &c. *if they fly, in manner foreſaid, to the Kirk, the Law aforeſaid ſhall be kept and obſerved to them.*"

THERE ſeems to have been this other difference too, by the books of the old law, between murder upon forethought and ſlaughter, that the trial of murder was ſummar, whereas manſlaughter could not be tried till after forty days, as appears by the ſtatutes of Robert II. from *Chap.* 3. to *Chap.* 9.

AFTER the Reformation, when the *jus aſyli*, formerly given to churches, drop'd, the diſtinction between

tween murder and manſlaughter was look'd on with leſs attention, and libels were commonly framed indifferently, for murder, and ſlaughter in general, without any mention of forethought felony; nor was it ever objected, that malice or premeditate deſign was requiſite to make the crime capital: And criminals were puniſhed to death, where from the proof there was not a colour or pretence of forethought, or any premediate deſign; as will appear from looking into the books of adjournal. And many inſtances might be given, particularly in the caſe of Jean Currie, againſt William Fraſer, the laſt of July 1641; where the pannel was condemned upon an extrajudicial confeſſion, adminiculated with other circumſtances; in which he ſet forth the fact, that the defunct and he had ſome little quarrel about a ſtaff; and hearing that he had murdered his Brother, he came into a houſe where the defunct was; and that either the defunct, or ſome other that was by, took the pannel by the arm, to hold him: Having freed himſelf, he aim'd a ſtroke with a whinger at the defunct's arm; but miſſing it, he ſtruck the defunct about the pap. And upon this proof, he was found guilty, and executed.

In the caſe of Bruce againſt Marſhal, the 3d April 1644. ſlaughter was libelled, and he was condemned upon his own judicial confeſſion: from which it appears, That he was ſo far from having any forethought, that he ſuffered not only the greateſt provocation in words, but was even beat with hands and feet by the defunct while he was on the ground; but at laſt getting up, and (as the confeſſion bears) being overcome with paſſion, he drew a knife, and ſtruck at him in two ſeveral places of his body, whereby he died. And upon this confeſſion, where there was ſuddenty, provocation and paſſion, he was brought in as guilty, and condemned to be beheaded.

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THE law remaining ſomewhat uncertain concerning caſual homicide, and there being no longer any benefit of girth as formerly, in the year 1649, an act was paſt during the Uſurpation, for removing all queſtion and doubt that might thereafter ariſe in criminal purſuits for ſlaughter, ordaining, that the caſes of homicide after following, *viz.* caſual Homicide, Homicide in lawful defence, and Homicide committed upon thieves and robbers, ſhould not in time coming be puniſhed by death, notwithſtanding any laws or Acts of parliament, or any practick made heretofore, or obſerved in puniſhing of ſlaughter. And this paſt into a law after the Reſtoration in the year 1661; and at the ſame time, all deciſions given conform to this act, ſince the 4th of February 1649 years, are declared to be ſufficient to ſecure all parties intereſted, as if the act had been of that date; which was neceſſary, becauſe the acts during the Uſurpation had been reſcinded: and this law has ever been looked upon as the ſtandard. And the practice of the court of Juſticiary ſince that time, clearly demonſtrates, that ſlaughter of ſuddenty, and ſlaughter upon provocation, which could not be brought under one or other of the particulars there mentioned, have been taken to be capital.

THE procurators for the pannel here obſerved, "That though in the caſes there mentioned, the law "ordained ſlaughter not to be capital, yet it nei-"ther ſaid nor ſuppoſed that the former law, where-"by pannels were intitled to plead againſt a capital "puniſhment, was thereby abrogated, but only ſta-"tuted in the caſes there mentioned."

To this it was anſwered, that the Narrative of the ſtatute was for removing of all queſtion and doubt that may ariſe thereafter in criminal purſuits for ſlaughter, and conſequently cannot be ſuppoſed to have left doubtful caſes, that the pannel's procurators muſt

muſt admit were not ſo clear as caſual Homicide, and Homicide, in defence; nay the law ſeems to ſuppoſe pretty plainly, that all ſlaughter by the laws and acts of parliament, or practicks, was capital, not declaring what was law from any other period than the year 1649, but enacting the ſame with *à non obſtante*, and judging it neceſſary to confirm the deciſions that had paſt conform to that act during the Uſurpation, which would have been vain, if it had not been at leaſt doubtful, whether caſual Homicide, Homicide in lawful defence, and ſlaughter committed upon thieves and robbers, did not ſubject thoſe guilty to the pain of death: and if thoſe degrees of Homicide were ſo much as doubtful, it is not poſſible to conceive that *chaud melle*, or ſlaughter committed, *dedita opera*, tho' without forethought, was, by the law of *Scotland*, not capital. Or if it ſhould be ſuppoſed to have been doubtful, whether theſe laſt degrees of Homicide were capital; that the legiſlator, upon a narrative, that all queſtion and doubt that might ariſe hereafter in criminal purſuits for ſlaughter, ſhould be removed, would have enacted in the clearer caſes, with *a non obſtante*, and left the more difficult in the dark, as ſurely the greateſt advocates for ſlaughter on ſuddenty muſt admit; that at leaſt, it is more culpable than either Homicide merely caſual, or Homicide in lawful defence.

The argument drawn from the rubrick of the Act, which mentions degrees of caſual Homicide only, can conclude no more, than that the title is imperfect; and it would be reſting too much upon an argument *à rubro*, to make it defeat what is ſaid in the law, That all queſtions concerning ſlaughter were thereby to be removed, and which oppoſes caſual Homicide to Homicide in lawful defence; and conſequently cannot under the words *caſual Homicide* comprehend all ſlaughter not upon forethought felony. And Sir

George Mackenzie in his obſervations upon the act takes notice, that the title is very ridiculous, and conſequently no argument can be drawn from it.

One thing may not be improper to notice, is, that if killing by forethought felony was the only ſpecies of ſlaughter capital, the Crown was diſabled from pardoning any capital ſlaughter whatſomever, which does not appear to have been the opinion of our lawyers.

As to the deciſions ſubſequent to this law, they will be found intirely agreeable to the doctrine now laid down; Sir George Mackenzie obſerves, that though many lawyers are poſitive, that though *homicidium in rixa*, even where the author of the plea is known, may by the rigor of law be puniſhed by death, yet that no country uſes this rigor; yet he remembered, that, in William Douglaſs's caſe, this was urged, and albeit it was not proven that he was the killer, yet the aſſize found him guilty, and he thereupon died. This is a caſe more favourable, than where the perſon that gave the mortal wound is known, though given ſuddenly, and even upon provocation; and therefore ſhews what our law is, and with how little reaſon the procurators for the pannel maintain their argument upon the law of Scotland.

In the caſe, his Majeſty's advocate againſt Nicolſon, the 24th June 1673, murder and ſlaughter, without forethought, were charged upon Nicolſon the pannel, and his procurators pleaded the benefit of the act of parliament anent caſual Homicide, in the ſeveral degrees thereof, he being in a condition that he was not able to remember. To this it was anſwered, That the defence was not relevant, in regard the Homicide could not be ſaid to be caſual, ſuch as the caſe of throwing of ſtones over dikes, and accidentally killing a paſſenger: And the pannel having afterwards proponed a defence, That being in uſe to carry

carry a gun as a fowler, and calling accidentally for meat to his dogs at a mill, the defunct fell upon him, and offered to ſecure him as a French ſoldier, or fit to be one; in the ſtruggle, his gun being a half bend, went off and killed the defunct: both the libel and defence were found relevant, and it appeared upon the proof, that Nicolſon was drunk, and that there was no previous quarrel; but taking exception at ſomewhat the defunct ſaid, he ſhot him with his gun; and by the verdict of the aſſize, *he was found guilty of the ſlaughter committed upon the defunct*, and ſentenced to have his head ſtruck off in the Graſs-market; which ſhows that neither drunkenneſs nor ſuddenty is a relevant defence againſt the *pœna ordinaria* in ſlaughter.

And, in the caſe of *Murray* contra *Gray*, 10th *June* 1678, the Lords *found the libel relevant, and that there was no neceſſity of any diſtinct probation for proving precogitate malice*; which clearly ſhows that ſlaughter, other than upon forethought, was capital. And to ſhow that provocation and paſſion are not received as defences againſt the *pœna ordinaria*, a multitude of deciſions might be brought, particularly in the caſe of *Aird*, who was indicted on the day of 1693, for the ſlaughter of *Agnes Bayne*, having given her ſome ſtrokes on the ſide and belly with his foot, by which ſhe fell into fainting fits, and immediately died. The defence was, *Great Provocation and caſual homicide*: *Provocation*, in as far as ſhe threw a chamber-pot in his face; and when he gave her hard words, ſhe and her neighbours fell upon him and beat him, upon which he gave her the ſtrokes above-mentioned. And in that trial it was argued, there was no *animus occidendi*, no previous malice, no mortal weapon; and the texts from ſcripture urged in defence of the preſent pannel, and the arguments from the civil law, and from our own

own acts of parliament were urged; nevertheleſs the Lords *found the libel relevant, repelled the defences*; *and, upon the proof, he was ſentenced to die.*

In the caſe of *William Carmichael*, *on the* day of 1694, *Drunkenneſs* was founded on to excuſe a *pœna ordinaria*, and forethought was neither libelled, nor proven; and the Lords *found the libel relevant*; and, upon the proof, he was ſentenced to be hanged.

In the year 1695, *George Cuming* writer *in Edinburgh*, was indicted for the crime of *murder* or *manſlaughter* of *Patrick Falconer*; the defences now offered for the pannel upon the diſtinction in the old law, between forethought and *chaud melle*, were offered; nevertheleſs the libel was found relevant, and the aſſize returned a verdict, *guilty of manſlaughter*; upon which he was condemned to die.

In the caſe of *Burnet* of *Carlops*, the 22d *January* 1711, tho' a defence was ſuſtained, yet the libel without forethought was found relevant: And in that of *Hamilton* of *Green*, the 30th *June* 1716, the pannel offered to prove, That he was accidentally at the houſe of *Thomas Arcle*, of whoſe murder he is accuſed, at the day libelled, with ſome of his acquaintances, and had no deadly weapon along with him; That he became inebriated to a great degree, and having left the houſe, and returned to aſk for the ſlip or cover of the ſheath of a ſword, the defunct gave him moſt indecent, injurious and ſcurrilous language, and perſiſting in it, the pannel puſhed, or ſtruck at him with his ſword, having the ſcabbard thereon, that he had reaſon to believe had a crampet upon it: And being ſtill more and more provoked by repeated injurious words, to protect himſelf from further inſolence he had reaſon to look for, the pannel ſtill remaining on horſe-back, the defunct ruſhed himſelf upon the ſword. And this circumſtantiate

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fact was offered to be proven. Nevertheleſs the libel was found relevant, and the pannel's haill defences repelled, and upon the proof, was ſentenced to have his head ſevered from his body, and was accordingly beheaded.

In the caſe of *Thomas Roſs* and *Jaffrey Roberts*, the 20th July 1716, it was pled for the pannels, that being recruits lately come from *England* to *Scotland*, and not knowing the way, they aſked the defunct the road to *Edinburgh*, who refuſing to ſhew it, and one of the pannels expoſtulating with him, why he treated a ſtranger ſo, that came to ſerve the King? He uttered very diſreſpectful words with reſpect to his Majeſty; and one of the pannels having called him villain for ſuch opprobrious expreſſions, he came up to *Roſs*, and with his fiſt gave him a blow on the face, and then pulled him down to the ground, and beat him with a great ſtick, to the imminent danger of his life, ſaying, that he ſhould never go alive out of his hands: And *Roberts* having come to his aſſiſtance, and reſcued him a little; *Roſs* the pannel gave the defunct a wound with a knife, whereof he died. *Roſs* pleaded, There neither was nor could be forethought felony, or premeditate malice, againſt a perſon whom he had never ſeen before: That it was committed upon ſuddenty: That he had the higheſt provocation, both verbal and real. Nevertheleſs, by the interlocutor, *Roſs* the pannel his giving the wound was found relevant to infer the pain of death. And the defence from provocation by words, and receiving a blow on the face, being pulled down to the ground, and beat with a great ſtick *to the danger of his life*, jointly ſuſtained relevant to reſtrict the libel to an arbitrary puniſhment, was found to be elided by the reply, That, at the time of giving the wound to the defunct, the defunct's hands were held by *Jaffrey Roberts*

berts the other pannel. From whence 'tis evident, that ſlaughter upon ſuddenty, *in rixa* or *chaud melle*, and by a perſon who had received the greateſt verbal and real injuries, even beyond that of being thrown into a kennel, of the nature that is ſet forth into which the preſent pannel was thrown, is by that interlocutor found *homicidium doloſum*, and not *culpoſum*, but capital.

And, in a very late trial, in the caſe of *Davidſon* the ſoldier, ſlaughter upon the greateſt ſuddenty was ſuſtained, and he was upon the proof executed.

And in the judgment given in 1717, in the caſe of *Brock* and *Lindſay*, determines this point beyond all diſpute. Theſe pannels were accuſed of the murder of one *Anderſon*: And as the libel did expreſsly ſet forth a quarrel and a ſtruggling betwixt the two pannels and the defunct, which made it directly an *homicidium in rixa*; ſo the pannels, at leaſt *Lindſay*, offered a pretty ſtrong defence, namely, that the defunct, without any provocation, juſtled them, and ſtruck at *Lindſay* and beat him down to the ground; and it was while they were on the ground the wound was given. And the defence was pled for two ſeveral purpoſes: Firſt, That the crime was not capital, becauſe no forethought felony. And 2dly, to intitle them to the act of indemnity, under which all homicides were included, except wilful murder, and ſlaughter of forethought felony And the interlocutor upon the relevancy was in thir words, *Find the pannels, or either of them, at the place and time libelled, their giving* Archibald Anderſon *a cut or wound in the neck or throat, or other mortal wound, with a knife or other mortal weapon, whereof he the defunct ſoon thereafter died; or that the ſaid pannels, both or either of them, were art and part therein, relevant to infer the pains of death, and other pains libelled: And repell the haill defences for the pannel, excepting that defence pled upon his Majeſty's gra-*

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cious act of indemnity; anent which the ſaid Lords ſuperſeded to give their judgment, till the concluſion of the probation, and return of the verdict.

THIS then is an undoubted authority, that homicide may, by the law of *Scotland*, infer the pain of death, though it be neither wilful murder, properly ſo ſpeaking, nor forethought felony; otherwiſe the Court could not have found the crime relevant to infer the pains of death, and at the ſame time reſerve the conſideration, whether there was any forethought felony, or not.

UPON this interlocutor a proof was adduced, and a verdict returned, finding Lindſay, one of the pannels, guilty; and yet the Court having reſumed the conſideration of the indemnity, found him intitled to the benefit of it: that is, in other words, they found the crime was neither voluntary murder, nor ſlaughter, of forethought felony. So that 'tis plain, had not the indemnity intervened, Lindſay muſt have ſuffered death for killing, though there was no previous deſign or forethought.

AND an interlocutor upon the relevancy, much to the ſame purpoſe with the former one, was alſo pronounced 31ſt of Auguſt 1721, in the caſe of Samuel Mathews a ſoldier; where the libel was found relevant to infer the pain of death, reſerving the conſideration of another act of indemnity then pled for the pannel.

IT would be in vain, and lengthen a paper already too long, to run through all the deciſions which ſhew, that neither the drunkenneſs of the pannel, nor provocation given him, nor the ſuddenty upon which the fact was committed, can afford a defence to the pannel, to exculpate the ſlaughter, or leſſen the ordinary puniſhment: and therefore the purſuers ſhall leave the firſt branch of the defence with the Lords, with this obſervation, that if it is really founded in law, by looking into the books of adjournel, one would

would think our law has hitherto been very ill underſtood.

2do, It was offered, what indeed is alone applicable in the preſent caſe, " That if the pannel intended " only to wound or kill Bridgeton, and by miſad- " venture the deceaſt Earl of Strathmore was wound- " ed, and of that wound died, the *pœna ordinaria* " was not to be inflicted."

It was anſwered, that according to the rules of the civil law, he who intending to kill one, kills another, is nevertheleſs ſubject to the *pœna ordinaria*; ſo *Julius Clarus* delivers his opinion in his *Receptæ Sententiæ*, *lib.* 5 § *homicidium*, *N.* 6. where, after having taken notice, that the contrary was indeed the opinion of ſome, adds, *Sed certe ego ſi caſus contingeret*, *illi facerem caput amputari.* And the learned *Matthæus*, *lib.* 48. *tit. de Sicariis*, § 12. gives the ſame opinion, obſerving that the act is conſummate, there is the *animus* or deſign of killing, and death: That it would be a ridiculous defence, that the pannel intended to ſteal the goods of one man, but happened to ſteal thoſe of another; or againſt adultery, that he intended to defile one man's wife, and happened to light upon that of another: And he thinks 'tis as unreaſonable to hope for ſafety from this defence, that the meaning was to kill one, but another received the ſtroke, and died.

VOET. in his commentary agrees with them, *lib.* 48. *tit.* 8. *n.* 2. where he ſays, that there is no difference, *Sive vulnus in titium directum ab eo declinatum*, *Mævio in proximo ſtanti lethale fuerit*, *ſive denique occidatur qui cædis impediendæ cauſa*, *ſeſe medium inter aggreſſorem & defendentem interpoſuerit*: *quia prævalet*, *quod principale eſt*, *nec error talis tollit aut occidendi animum*, *aut cædem lege Cornelia vindicandam.* And for this not only founds upon the *l.* 18. § 3. *& § ult. ff. de injur.* and *l.* 5. § 1. *ff. de ſervo corrupto*; but adds

adds the authorities of *Farinacius*, *quæſt.* 125. *n.* 156 & 157. as alſo, that of *Fachinæus*, *Carpzovius* and *Berlichius*, and others. And this opinion obviates the defence, as put in its moſt favourable light, which however would be of very delicate proof, that the defunct thruſt himſelf between *Bridgeton* and the Pannel, and received the ſtroke aimed at the other.

THE learned *Sande*, *lib.* 5. *tit.* 9. *defin.* 6. which has this title, *Qui alium pro alio occidit, nihilominus ordinaria, leg. Cornel. pœna afficiendus*, ſays, after agreeing, that, according to the *Roman* law, ſuch error would not have excuſed the murder. *Hæc ſententia ubique uſu obtinuit, & ſecundum eam, reus ad mortem condemnatus & decapitatus eſt*, 17th November, *anno* 1621; and there alledges the authority of *Gomeſius*, *Emanuel*, *Soir*, and *Carolus Molinæus*, *Qui alios cumulat*, in his book *ad conſuetudines Pariſienſes*. And Sir George Mackenzie in his criminals, tit. *Murder*, § 9. ſays, after ſtating the queſtion, "Yet I think he "ſhould die, ſeeing the deſign of killing a man, and "not any particular man, is murder; and the killer "intended to deface GOD Almighty's image, and "to take from the king a ſubject.

'TIS nothing to the purpoſe, that ſome of the authors who write upon the *Roman* law, are of a different opinion, in a caſe not determined in words by the text, when the bulk of the commentators are of the other ſide, the moſt recent and of greateſt authority; and when it appears to be received as a rule by the practice of nations, that the ordinary puniſhment ſhould be inflicted. And it may not be improper to obſerve, that the caſes where lawyers diſſent from the received opinion, are generally unjuſtifiable homicide, that is, where the byſtander was killed, when the killer intended to execute his purpoſe in lawful defence, and not *in homicidio culpoſo*, which is the higheſt the Pannel's caſe could poſſibly be pled

upon provocation, according to any opinion delivered by the ſtrongeſt advocates for the queſtion the pannel pleads.

That it is not always neceſſary, that the intention ſhould be directed towards the miſchief done, in order to inflict the pain of death, muſt be evident from looking tothe xxi. *chap.* of *Exod.* verſ. 22. and 23. where, *If a woman with child is hurt when men are ſtriving, and miſchief follow*; *life is to be given for life.* And the kind of killing now in queſtion was plainly ſuch as, according to the law of *Moſes*, would not have intitled the ſlayer to the benefit of the city of refuge: For though in the xix. *chap.* of *Deuter.* verſ. 4. *Whoſo killeth his neighbour ignorantly whom he hated not in time paſt*, is ſaid to be intitled to that privilege; yet this is limited immediately with an example of manſlaughter merely caſual.

The procurators for the pannel inſiſted, "That "this kind of killing was intirely caſual, beyond, "and without the intention of the party: That in "the caſe of Maſſon in the year 1674, Burnet of "Carlops, and ſeveral others, where it appeared "there was no intention to kill, the puniſhment was "mitigated."

It was anſwered, That where, from the nature of the weapon, and means by which the wound was given, taking all the circumſtances together, there was no evidence or preſumption that the pannel intended death to any perſon whatſoever; and the *propoſitum* was neither proved, nor could be preſumed, as in the caſe of Maſſon. And in that of Burnet of Carlops, where perſons having ſwords, only ſtruck with ſtaves, it was held as approaching towards a caſual homicide. But that can never be pretended when the wound given as libelled was ſo clearly mortal, and the inſtrument the moſt lethal; and the deciſion

ciſion of *Carlops*, even with that difference, ſtands ſingle in the books of adjournal.

It was further contended for the Pannel, "That "as *animus occidendi*, and death following, are admit- "ted to be neceſſary in order to inflict the higheſt pu- "niſhment; ſo as from the circumſtances mentioned "in exculpation, 'tis evident there was no intention a- "gainſt the defunct: And it cannot be known whe- "ther the pannel's deſign was to kill *Bridgeton*, ſince "he was not killed, or if the wound would have "been mortal, had the ſword reached him; and "conſequently the neceſſary requiſites to conſtitute "a murder, were not to be found here."

It was anſwered, That the invaſion with a mortal weapon, with which the defunct was killed, was a ſufficient proof in law that the invader intended to kill, ſince death followed; and that there is no wounding by meaſure, and certainty not to kill. The act implies *dolus* and malice, which, with death following, makes murder, without any further proof of an act of the will to kill; and there would have been as little evidence that the pannel intended to kill *Bridgeton*, if he had actually received the wound and died, becauſe it was poſſible the ſword might have pierced further than he intended; and if he did not deſign to kill *Bridgeton*, and killed the defunct, he muſt have been the perſon againſt whom the miſchief was directed. As indeed it may be argued from the rage and drunkenneſs pled in excuſe and defence, 'tis poſſible that *ex rabie* he intended to kill whomever he met with; and if rage from paſſion and drink is allowed to palliate murder, 'tis impoſſible any one can be ſafe. And theſe very circumſtances, without which the defence has not a colour, muſt, at the ſame time, give evidence, that the Pannel's intention of purſuing *Bridgeton* with a ſword, was to kill and deſtroy him; for he pleads them to excuſe his killing of

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the defunct, as ſufficient provocations to incite him to it

THE law of *England* was frequently mentioned by the procurators for the Pannel in the pleading, as what would juſtify the arguments brought for them; and particularly it was ſaid, "That all killing of a "ſuddenty by that law, was only manſlaughter, and "not murder." But the contrary will appear, by looking into *Hawkin's pleas of the crown*, *book* 1 *chap.* 31. of *Murder*, where he clearly diſtinguiſhes between deliberate murder, and murder committed on a ſudden: And in this laſt caſe, malice prepenſed is, by the law of *England*, often implied, as Lord Chief Juſtice *Keyling* lays it down in his *Reports*, *pag.* 127. *Regina verſus Magrige*, and juſtifies it by the caſe of *Holloway*, who eſpying a boy that came to cut wood, took him and tied him to an horſe's tail with a cord, and then gave the horſe two blows, whereby he run away, and broke the boy's ſhoulder, where of he died; which muſt have been ſudden, and was adjudged murder. And *pag.* 130. he ſuppoſes *A.* to have been provoked by *B.* and to have drawn his ſword and made a paſs at him, when *B.* had no weapon drawn, but miſſed him: Thereupon *B.* draws his ſword, and paſſes at *A.* and there being interchange of paſſes between them, *A.* kills *B.* *I hold*, ſays the author, *this to be murder in* A. *for* A's *paſs at* B. *was malicious, and what* B. *afterwards did was lawful.* Here is both ſuddenty and provocation, and yet in the opinion of that great Lawyer, it would have been held murder. And in the preſent queſtion, neither *Bridgeton* nor the deceaſed had any weapon drawn.

AND to ſhew, that, according to the law of *England*, the aiming at one, and hitting another, does not make death following, manſlaughter; in the end of the next page he ſets down the caſe of Dr *Williams*, a *Welſhman*, who having a leek in his hat upon St *David*'s day, a certain perſon pointed to a jack of lent that hung up hard

by, and ſaid to him, *Look upon your countryman!* At which Dr *Williams* being enraged, took a hammer that lay upon a ſtall hard by; and flung at him, which hit another, and killed him: And tho' being indicted upon the ſtatute of ſtabbing, it was reſolved he was not within that ſtatute, becauſe of the kind of weapon; *Yet*, ſays the author, *if the indictment had been for murder, I do think that the* Welſhman *ought to have been convicted thereof**.

And ſince the Pannel's procurators inſiſted ſo much upon the law of *England*, the Purſuers can't but mention the authority of one of thoſe lawyers, as to one of the caſes they themſelves ſtated in the debate, *Hawkin's pleas of the Crown, chap.* 31. *in fin.* The caſe is, That a perſon ſhooting at tame fowls with intent to ſteal them, accidentally kills a man; that author ſays, *That it is agreed it would be murder, and not manſlaughter.*

'Tis true indeed, that it would appear by the law of *England*, as laid down in theſe *Reports*, that if there is provocation, in ſome particular caſes, ſufficient to alleviate the act of killing, it reduces it to a bare homicide. But then no provocation from words is ever ſuſtained, nor even aſſaults, but upon this ground, That he who was affronted or aſſaulted, might reaſonably apprehend, that he that treated him in that manner might have ſome further deſign upon him, which reſolves the matter into a kind of ſelf-defence; and in this the law of *England* differs from the law of *Scotland*, which requires, in order to lawful defence, and killing under the notion of danger from the aſſailant, *ut quis ſit conſtitutus in periculo vitæ.* But then there is no pretence of apprehending dangerous conſequences, when

* Lord Chancellor Bacon is in this opinion of *Hawkins* expreſsly. See *vol.* 4. *(edit.* 1740.) *p.* 41. on explaining this maxim of Engliſh law. *In criminalibus ſufficit generalis malitia, &c.* where he ſtates caſes very ſimilar to the caſe here argued.

when the party killed, or intended to be killed, was flying, and had no weapon, as in this caſe, and the paſſion in ſuch circumſtances reſolves itſelf ſimply into revenge, which no law ever ſuſtained to alleviate or palliate murder; for there the malice prepenſed is clear and evident.

But then, if it be conſidered in the preſent caſe, that the party affronting or invading, is not only ſet forth to have fled, and to have had no weapon in his hand, but that he eſcaped; what colour is there, upon theſe principles, to alleviate the killing of a perſon interpoſing to prevent the miſchief, when there was no reſiſtance upon the part of any perſon whatſoever, as in the caſe of a combat, and where it was voluntary as to the perſon giving the wound, in regard he could have ſtopped when *Bridgeton* fled, which cannot be ſaid with regard to the *Welſhman* who threw the hammer?

To conclude this matter, It appears pretty evident, the circumſtances offered in exculpation afford, by the law and practice of *Scotland*, no relevant defence, ſuppoſe the perſon killed had been the provoker, much leſs in the caſe where the perſon killed generouſly interpoſed to prevent the miſchief, having given no colour or cauſe of provocation, having no weapon, and where the perſon, againſt whom the invaſion is ſaid to be meant, was without drawn ſword and flying: The murder in theſe circumſtances muſt have proceeded either from rage and revenge, which no law can ever favour, ſince laws were made, and judges appointed, that private perſons ſhould not attempt judging in their own caſe, and to bridle the unruly paſſions of men, or from ſet purpoſe and deſign to kill the defunct, from former reſentment. And what adds to the preſumption of the laſt, is the nature of the wound, quite through the body, and that the ſword went through the back, lower than where it pierced the belly; which excludes all poſſibility of pleading, that the

the Pannel's ſtumbling might have puſhed it forward, becauſe, by the nature of the thing, had he ſtumbled after the ſword pierced the defunct's body, it muſt have raiſed the point of the ſword, ſo that it could not have pierced lower in the back than in the belly.

Upon the *firſt* branch of the libel, the Purſuers think it unneceſſary to open the particular circumſtances from which the Pannel's cauſeleſs ill-will and reſentment may appear againſt the defunct; that is matter of evidence, and upon which no interlocutor in the relevancy can paſs, and muſt ly in the breaſt of the aſſize: And againſt this relevancy no exception or colour of exception can be pretended to ly. And as to the ſeparate relevancy, and *art* and *part*, what is offered to be proven, That the defunct thruſt himſelf in a manner upon the Pannel's ſword: As it is of too delicate proof, and was repelled in the caſe of *Hamilton* of *Green*, it is believed the Lords can have no regard to it. And as for the drunkenneſs and provocation, eſpecially where the provocation is ſaid to have been given by a third party: If it were ſuſtained, it muſt turn up what have been thought the foundations of the law of *Scotland*, and ſtand in oppoſition to all the practice that can be diſcovered from the books of adjournal. And the allowing ſuch defences as might poſſibly have ſome colour in the law of *England*, to be proven, would be of dangerous conſequence in the law of *Scotland*, where the purſuers are tied up to a preciſe relevancy: So that the procedure in that part of the Iſland, in trials of this kind, unleſs the whole form of trial were adopted in our law, would open a door for leaving murders unpuniſhed. The law of *Scotland* alone can be the rule in this caſe; tho', at the ſame time, it is believed, that the *ſpecies facti*, as ſet forth by the Pannel, would be ſufficient warrant

warrant for a verdict of murder, even according to the laws and practice of *England*.

In reſpect whereof, &c.

CHA. ARESKINE.

INFORMATION for *James Carnegie* of *Finhaven*, Pannel;

AGAINST

SUSANNA *Counteſs of* Strathmore, *the Honourable Mr* JAMES LYON, *Purſuers, and his Majeſty's Advocate, for his Highneſs's Intereſt.*

THE ſaid *James Carnegie* of *Finhaven* ſtands indicted before your Lordſhips of WILFUL and PREMEDITATE MURDER and HOMICIDE; in ſo far as, *Having a cauſeleſs ill-will and reſentment againſt the deceaſed* Charles *Earl of* Strathmore, *he conceived a deadly hatred and malice againſt him; and* (on the day libelled) " did, with a drawn ſword, " without the leaſt colour or cauſe of provocation " then given by him, invade the ſaid deceaſed Earl, " and did baſely and felonioufly murder and kill him, " by giving him a wound therewith in the belly, " whereof he ſoon after died. *At leaſt*, At the time " and place deſcribed, the ſaid *Charles* Earl of *Strath-* " *more* was, with a drawn ſword, felonioufly and " barbarouſly wounded, and died of the ſaid wound " within a few days thereafter; and that the Pannel " was art and part in this murder. *And the Indict-*

" *ment*

" *ment concludes*, By all which it is evident, That you " are guilty, art and part, of the crimes of wilful " and premeditate Murder and Homicide, or one or " other of them, at the time and place, and in the " manner above ſet forth."

THE Pannel was brought to your Lordſhips bar, upon the 15th of *July* current, to plead to this indictment, where he appeared under that deep melancholy and depreſſure of ſpirit with which a man and chriſtian muſt be loaded, who finds himſelf accuſed, not only of ſhedding of blood, but of ſhedding the blood of one, whoſe perſonal character and qualities drew, from all who had the honour to know him, the higheſt eſteem and regard; and for whom the Pannel himſelf had all the honour, entire friendſhip, ſincere affection and high reſpect, that either his rank, perſonal merit, or great benevolence, could call for; and of having done this barbarouſly, from premeditated malice, deadly hatred, and felony forethought.

YOUR Lordſhips having put the queſtion to him, in the ordinary way, What he ſaid to the indictment? He expreſſed himſelf in theſe words;

My LORDS,

" I Find myſelf accuſed, by this Indictment, of " maliciouſly murdering the Earl of *Strathmore*; " but, as to any ill-will, malice or deſign to hurt " the Earl, GOD is my witneſs, I had none: On " the contrary, I had all the due regard, reſpect and " kindneſs for his Lordſhip, that I ever had for any " man. I had the misfortune that day to be mortally " drunk, for which I beg GOD's pardon; ſo that, " as I muſt anſwer at GOD's great tribunal, I do " not remember what happened, after I got the af- " front your Lordſhips will hear of from my law- " yers. One thing I am ſure of, if it ſhall appear

" that I was the unlucky perſon who wounded the " Earl, I proteſt before GOD, I would much rather " that a ſword had been ſheathed in my own bowels. " And further, I declare, That I do not ſo much as " remember, that I ſaw the Earl after I came out of " the kennel, and even not ſo much as the drawing " of my ſword; and therefore I cannot acknow- " ledge the libel, as it is libelled."

FROM theſe words ſo expreſſed, it is evident, in what a diſmal ſituation of mind, this unhappy Gentleman muſt be. If what he hath ſaid be true, he cannot be guilty of the malicious murdering the deceaſt Lord; yet he may have been the unhappy inſtrument of his unfortunate death; and what a bitter reflection that muſt afford, all circumſtances, particularly that of friendſhip, conſidered, will occur to every generous man: It may produce thoughts more afflicting than that of death itſelf.

THE Counſel for the Pannel, in the entry to the debate, judged themſelves under a neceſſity, from the great honour all of them had for the perſon of the deceaſt Lord, and always will have for thoſe who remain of his family, and from the particular obligations of friendſhip that ſome of them owed him in a more diſtinguiſhed manner, to declare, that if they had the leaſt apprehenſions, that his Lordſhip's death had happened by, or from any deſign or intention of the Pannel againſt his life, that no motive, even of relation or natural tie to the Pannel, would have induced them to open their mouth in his defence; but that innocence is always preſumed, and that the circumſtances, ſo far as yet appears, ſeem to ſet forth the action as a *fatality*, and not a *deſign*, juſtice and duty called upon them to give their weak aſſiſtance, until the matter appeared in another light.

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THE fact, as laid in the libel, is in very general terms, and thoſe circumſtances from which the nature of the action falls to be determined, and which are material for the Pannel's defence, being entirely omitted, the Procurators for the Pannel were obliged to ſet forth the caſe as it truly happened, according to the information given them; which, by our law and form, they are enabled to do, without owning the libel, or admitting even thoſe facts, which in the recital, according to information, they are led to narrate: And the account given of it was,

"THAT, on the 9th of *May* laſt, the deceaſed "Earl of *Strathmore*, the Pannel, and ſeveral others, "were called to be preſent at the funerals of a daugh- "ter of *Patrick Carnegy* of *Loures*, a near relation of "the Pannel's: That they dined together at the Gen- "tleman's houſe, where they drunk a good deal, all "in friendſhip and familiarity, without the leaſt ap- "pearance of quarrel or difference: That, after the "burying was over, they, together with the Lord "*Roſehill*, Mr *Thomas Lyon*, and Mr *Lyon* of *Bridge-* "*ton*, and other Gentlemen, went to one Clerk *Dick-* "*ſon*'s, a tavern in *Forfar*, where they drunk pretty "plentifully, and where the Pannel happened to be "overtaken with too much liquor: That all this "while, nothing but friendſhip appeared betwixt the "deceaſt Earl and the Pannel; but that *Bridgeton* "was from time to time bearing hard upon the Pan- "nel; and by the whole tenor of his converſation, "endeavouring to fret or affront him.

"AFTER this, the Pannel waited on the Lord "*Strathmore*, at the Lady *Auchterhouſe*'s, where his "Lordſhip went to viſit, and *Bridgeton* followed them "thither, and in that houſe begun the former way "of converſation, making the Pannel's family con- "cerns the ſubject of his diſcourſe, in the moſt pro- "voking manner, aſking him in a jibing way, to

"ſupply

" ſupply a Lord in the company with money, pulling " him rudely by the breaſt, and gripping him by " the wriſt, and ſtriking his hand againſt the table, " telling him, he muſt give that Lord ſuch a ſum at " that time; then inſiſting, That he ſhould give him " the choice of his daughters; and ſtill gripping him, " and daſhing his hand in the foreſaid rude manner, " told him, he would have him promiſe to do ſo; " and aſking him, in an inſolent way, what, would " he not do it? Then telling him, if it were his caſe, " if he refuſed, he would maul him, ſhaking his " hand in the Pannel's face. After this, in a ridi- " culing way, deſiring him to ſettle his eſtate in a " certain manner, ſince he had no ſons of his own; " then upbraiding him with his debt. All which, " the Pannel bore with patience, and endeavoured " to ward off the diſcourſe, when *Bridgeton* ſtill in- " ſiſted in the moſt provoking way. And that " *Bridgeton* likewiſe uſed very great rudeneſs to the " Lady in whoſe houſe they were; particularly, " when ſhe in civility offered him a glaſs of brandy, " he, ſeeing the Pannel already overtaken with drink, " deſired the Lady to give it to him her brother; and " upon her ſaying, that her brother did not ſeem to " want it at that time, he gripp'd her by the arm ſo " rudely, as to make her complain, and ſwore by " GOD, her brother either ſhould drink it, or ſhe " ſhould drink it herſelf; and perſiſted in this way of " doing, till the Lord *Strathmore* thought it proper " to break off the viſit, and ſo went out of the " houſe.

" That *Finhaven* and *Bridgeton* followed the *Earl*, " and when they came to the ſtreet, ſome words " paſſed, and *Bridgeton* uſed the expreſſion, *God damn* " *him*, meaning the Pannel, and with that gripped " him by the breaſt, and puſhed him into a dirty ken- " nel two feet deep, over head and ears, where, in

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" the condition he was, he might have been ſmo-
" thered, if a ſervant of the Earl's had not helped
" him out, who at the ſame time expreſſed his indig-
" nation at the action he had ſeen, by theſe words
" addreſſed to *Bridgeton, Sir, tho' you be a gentleman,*
" *you are uncivil.*

" That *Bridgeton*, after having ſo flung the Pan-
" nel into the kennel, leaving him there, walked
" forward; at the ſame time turning about, and
" folding his arms acroſs his breaſt, ſcornfully laugh-
" ed at him in that condition.

" That the Pannel being helped out of the ken-
" nel in manner foreſaid, immediately drew his
" ſword, and in a juſt paſſion, purſued *Bridgeton* with
" a ſtaggering pace: And *Bridgeton* run towards
" the Earl of *Strathmore*, whoſe back was then to
" him, and endeavoured to pull out his ſword; at
" which time the Pannel coming up with *Bridgeton*,
" made a puſh at him; in which inſtant the Earl
" turning haſtily about, puſh'd off *Bridgeton*, and
" threw himſelf in the way of the ſword, by which
" he received the fatal wound."

THESE are the unlucky circumſtances of the fact, as the Lawyers for the Pannel have been inſtructed to plead: And from it as ſo ſtated, the defence inſiſted upon for the Pannel was, That the act of killing is not murder, nor capital, where there is no malice nor forethought againſt the perſon killed, either proved to have been conceived and retained at any time preceeding the act of killing, or preſumed from the circumſtances to have preceeded the act immediately before the committing of it: But that in this caſe, there is no antecedent malice ſpecified or libelled; and therefore it muſt be taken for granted, that there was none. And as to preſumed malice immediately preceeding the act, that the circumſtances entirely exclude that preſumption; firſt, Becauſe, as the fact

is

is laid, any blow or puſh that was intended, was made at, and deſigned for *Bridgeton*, and not againſt the Earl of *Strathmore*; and ſince the *initium facti* is to be conſidered, as well as the event, a puſh begun and intended againſt *Bridgeton*, could never be the foundation of a preſumption of malice againſt the Lord *Strathmore*, the perſon killed, without which, the killing could not be capital, but in this caſe was merely caſual and accidental, it having happened by the Earl's unluckily turning about in the time of the Pannel's very act of puſhing againſt *Bridgeton*, whereby the Earl received the fatal wound. 2*do*, That the pannel could never be more criminal in having killed the Earl of *Strathmore* by a thruſt directed at *Bridgeton*, than he would have been if he had killed *Bridgeton* himſelf; but that ſo it was, that if he had killed *Bridgeton*, after the provocation given in manner above ſet forth, that it would have been conſtructed only as caſual or culpable homicide, without forethought, becauſe done *ex incontinenti, & ex ſubito impetu, & calore juſtæ iracundiæ*; yea, in ſome meaſure in ſelf-defence, ſince the pannel having been thrown into the kennel, even to the danger of being ſuffocated, he had reaſon after that to expect the worſt from *Bridgeton*, ſince no Gentleman will throw another into a puddle, who is not ſuppoſed to be ready to go further, as he cannot but expect the ſtrongeſt retortion of the injury; and that the pannel had the more reaſon to think ſo, that *Bridgeton* immediately betook himſelf to the Earl of *Strathmore*'s ſword, and endeavoured to pull it out, having none of his own, by reaſon that the known ferocity of his character and behaviour is ſuch, that the country gentlemen of his acquaintance decline to keep company with him, if he wear any arms: In ſuch caſe the pannel was to expect the worſt, and ſo was in ſome meaſure in his own defence, altho' he may have exceeded

ceeded the *moderamen inculpatæ tutelæ*; which exceſs in ſuch circumſtances, would not be puniſhable by death, but only by an arbitrary puniſhment.

And in ſupport of this defence, the Counſel for the Pannel ſhall now, in this Information, endeavour, though ſomewhat out of the order of their pleading, to follow the Information given in for the Purſuers. And firſt, To ſhow your Lordſhips, that killing in ſuch circumſtances was not capital by the divine law, or law of *Moſes*. 2*do*, That it was not capital by the common law, which we in great meaſure follow in matters of that kind. 3*tio*, That it was not capital by our own ancient law. 4*to*, That our ancient law in that particular is not altered by the ſtatute of *Charles* II. 5*to*, That the practice of the court is not inconſiſtent, but agreeable to what is here pled. And 6*to*, that the laws of our neighbouring nations are for moſt part conſonant to thoſe principles, as well as the judgment of foreign courts.

And to begin with the divine law, it may be divided in two: firſt, the law of nature, which is the firſt of all laws, and hath no other author than God Almighty himſelf. 2*do*, His will revealed by writing, particularly in the laws delivered by *Moſes*.

And as to the law of nature, one of the firſt principles ſeems to be, that every action muſt be conſtrued and regulated from the intention of the actor. Every action whatever, except in ſo far as it is conjoined with the will and intention of the agent, differs in nothing from the action of an irrational creature; yea, if we may ſo ſpeak, as to call the operation or impulſe of an inanimate creature an action, the actions of man ſeparated from his intention and deſign as a rational creature, differ in nothing from the actions of brutes, or the impulſe of things inanimated; and conſequently that action, be what it will, can neither be crime nor virtue; it is a mere impulſe

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or motion, not properly ſubject to laws or rules. But then indeed, when it comes to be conjoined with the intention, or, which is the ſame thing, conſidered as the action of a rational agent, there it comes to be ſubject to laws, to be conſidered as criminal or virtuous: Or if it appear to be accidental, ſo as to have depended upon no will nor deliberation of reaſon, then it returns to be of the nature of the act of an irrational creature, or inanimate ſubſtance, and is ſubjected to no penalty, nor yet capable of receiving a reward. The plain conſequence of which is, that it is the *animus* alone that determines the nature of the act; and if the *animus* or intention was criminal, then, by the law of nature, the action itſelf amounts to a crime. On the other hand, if it be good and virtuous, the act is laudable by the law of nature, ſuppoſing even a bad conſequence ſhould follow. But in the third place, if the action truly ariſe from no intention or principle governing that action, it is neither laudable nor puniſhable, it returns to be of the kind already mentioned, the ſame with the like act of an irrational creature, or the impulſe of an inanimate ſubſtance, moved by a cauſe extrinſic to itſelf. And the conſequence of all this is, that by the primary law of nature, the intention muſt make the crime; and therefore if there appear no intention to commit that particular fact which happens to be complained of, it is not a crime, notwithſtanding of a bad conſequence; it is conſidered as a fatality.

And the application is plain to the preſent argument, that if the unfortunate act of killing the deceaſt Lord did not flow from any intention to him directed; then that act is not by the law of nature a criminal act, however the antecedent acts directed againſt another may be criminal. It is another queſtion, how far a rational agent, *verſans in illicito*, is bound for conſequences that did not fall under his intention?

tention? We ſhall afterwards endeavour to ſhew, that that is neither a queſtion in the law of nature, nor in the divine law; but is a queſtion ariſing from the municipal laws of particular kingdoms, or at fartheſt from the law of nations, ſometimes called the *ſecondary* law of nature.

As this point, that the intention directed towards the act committed, muſt govern the action, ſo as to render it criminal or not, according to the firſt principles of the law of nature, ſeems to be pretty plain, if we retire our thoughts from other after-laws; ſo indeed it is confirmed and illuſtrated by the written law of God, as delivered by *Moſes*, with regard particularly to the queſtion of manſlaughter. It is almoſt unneceſſary to obſerve, that whether the remedy againſt the penal conſequences of actions, committed without intention, was in form of an abſolvitor upon the trial, or by having acceſs to a city of refuge; it is the ſame thing: The queſtion is, what was to be the puniſhment that was to take effect? If the puniſhment was to be ſtopt in that form, by flying into a city of refuge, the principle of law is the ſame, as if the effect had been to be ſtopt in any other way. And juſt ſo, as we will afterwards have occaſion to notice, it is the ſame thing as to our law, whether the manſlayer was to be ſafe, by flying into gyrth or ſanctuary, according to the old law, or now to be ſafe by a judicial abſolvitor or reſtriction of the puniſhment. And juſt ſo with regard to the law of neighbouring nations; it is all one, whether a man is to be freed by benefit of clergy, or ſuch other form, if he is to be free. The foundation queſtion is only, what was the puniſhment that neceſſarily, *cum effectu*, falls to inflicted upon a homicide of ſuch and ſuch a kind; and as in this caſe, upon a homicde committed without forethought or malicious intention directed againſt the perſon that hath ſuffered? And therefore if, by the *Moſaick* law, one in the pan-

nel's circumſtances was to have the benefit of a city of refuge; the argument concludes, that by that law he would not have been ſubjected to the pain of death. Indeed we believe we will be able to go a little further to ſhew your Lordſhips, that, according to the opinion of the moſt learned interpreters and Doctors of the *Jewiſh* law, the benefit of the city of refuge was ſcarce neceſſary in ſuch a caſe as that which is now before you.

In the xix. *chap.* of *Deuteron.* the cities of refuge are appointed to be ſeparated in the midſt of the land, that every ſlayer may fly thither: *And this is the caſe* (ſays the text) *of the ſlayer, which ſhall fly thither, that he may live: Whoſo killeth his neighbour ignorantly, whom he hated not in time paſt*; or, as it is ſaid to be more literally in the Original, *from yeſterday the third day.* By this text your Lordſhips ſee thoſe two are conjoined as explicatory of one another, *ignorantly whom he hated not in time paſt*; and ſo the word *ignorantly* is put in oppoſition to *hatred in time paſt*, and by that means the ſenſe is plain, that by *ignorantly* is not meant, without knowing that he kills his neighbour, but without a foreknowledge, a foreſight, a former ratiocination and deſign: In which ſenſe, knowledge is moſt frequently taken, becauſe it is impoſſible to maintain, that if a man ignorantly kill his neighbour, even whom he hated before, taking the word *ignorantly* in that ſenſe, of his not knowing that he kills him, or killing him by mere accident, without his knowledge, can be liable as a murderer; becauſe it is impoſſible to conjoin even previous enmity with accidental ignorant killing, ſo as to make out a crime of murder; that were exceeding inconſiſtent with every principle of reaſon, far more with a law flowing from infinite perfection. But then the matter is fully explained by *verſe* 11. of that ſame chapter, which determines when a man is not to have the benefit of the city of refuge; *but if any man hate his neighbour, and ly in wait for him, and riſe up againſt him, and ſmite him*

him mortally that he die, and flieth into one of theſe cities: then the elders of his city ſhall ſend and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die. Here are both ſides of the queſtion put, the one fully to explain the other; the laſt to explain what is meant by *ignorantly*, whom he hated not *in time paſt*. The laſt text does by no means ſay, that if a man ſmites his neighbour whom he knoweth, although without hatred, and without lying in wait, and without riſing up againſt him, that he ſhall ſurely die; but on the contrary, puts the iſſue of his dying upon his hating of him whom he killed, and upon his riſing up againſt him whom he did kill; and upon his lying in wait, that is, in other words, upon his deſigning to take his opportunity from a premeditated malice: For indeed the meaning cannot be that of a formal lying in wait, or lurking in a paſſage where the perſon was to paſs; but he who deſigns the thing, and takes his opportunity, lies in wait, in the plain ſenſe of the text. Beſides, the word *ignorantly* very plainly imports, and carries under it that caſe of a man's killing by miſadventure one whom he did not intend to kill, that is plainly ignorance as to him who was killed; and yet it will be true, that if he deſignedly kill one in place of another, miſtaking the perſon, but deſigning to kill that perſon, as ſuppoſed to be the other, he does not ignorantly kill the man whom he does ſlay, he kills him knowingly, although he miſtake the man.

Nor is it of any importance, that the examples immediately ſubjoined in the 5th verſe, are inſtances of ſlaughter intirely accidental; and where the ſlayer did really not know that he killed, that is an example, but not an example exhauſting the rule, which the 11th *verſe* fully clears, as not extending the capital puniſhment to all who came not under the deſcription in the 5th *verſe*, but to thoſe alone who

hated

hated their neighbour, lay in wait for him, and roſe up againſt him.

And though this is plain enough from that part of the law, yet the matter is indeed more fully explained in xxxv. *chap.* of *Numb.* where there is another ordinance as to cities of refuge, and they are appointed to be ſix; and the general rule is ſet down, *That every one that kills any perſon unawares, may fly to thoſe cities.* Nothing can be plainer than the meaning of killing unawares, that is without deliberation, unexpectedly, without forethought, *ex improviſo, ex inconſulto:* Theſe are all ſynonymous, and accordingly the *Septuagint* tranſlation ſo renders the words ακουσίως, that is, *involuntarily*; and ſo likewiſe the *Jewiſh* Doctors have explained it, as will afterwards be noticed.

After this the text goes on with an enlargement or amplification of that general law, "And if he ſmite "him with an inſtrument of iron (ſo that he die) he "is a Murderer, *&c.* And if he ſmite him with "throwing a ſtone (wherewith he may die) and he "die, he is a Murderer, *&c.* Or if he ſmite him "with an hand-weapon of wood (wherewith he may "die) and he die, he is a Murderer." Theſe are the amplifications; but then follows the limitation in the 20th v. *But if he thurſt him of hatred, or hurl at him by lying of wait, that he die; or in enmity ſmite him with his hand, that he die: he that ſmote him ſhall ſurely be put to death; for he is a Muderer,* &c. Here is the limitation, he that killeth or thruſteth with an iron-weapon, is a Murderer, under the limitation introduced by the particle *but*, as an explicatory exception to the generality of the rule, *but if he thurſt him him with hatred*; that is, in other words, that he is a Murderer, if he thruſt him in hatred: And therefore commentators refer from this text to the other in *Deuteronomy*, already cited, for explication of this,

this, where it is ſtatuted, *That if a Man hate his neighbour, and riſe up againſt him, and ſmite him*; whereby they plainly underſtand, thruſting him of hatred, as the ſame with riſing up againſt him, and ſmiting him with hatred, ſo as to comprehend every manner of killing with any weapon; and conſequently that this is not a diſtinct manner of killing, from what is expreſſed in the 16th verſ. but a quality adjected to the manner of killing, ſo as to make it capital, *viz.* That it muſt be done in hatred. And this is yet more clearly explained by the 22d and following verſes, where the oppoſition is ſtated betwixt thruſting ſuddenly and of enmity, with a direct reference to the 16, 17 and 18 verſes, *But if he thruſt him ſuddenly without enmity; or have caſt upon him any thing, without laying of wait; or with any ſtone wherewith a Man may die, ſeeing him not, and caſt it upon him that he die, and was not his enemy, neither ſought his harm: then the congregation ſhall judge*, &c. *and ſhall deliver the ſlayer out of the hand of the avenger of blood.* There all the three methods of killing before mentioned are referred to; thruſting, properly appicable to the killing with a ſword, but without enmity; caſting any thing upon him, without lying in wait, or forethought, or with any ſtone, wherewith a man may die, the very thing expreſſed in the 17th verſ. and from which he is deem'd to be a Murderer; yet, if he was not his enemy, neither ſought his harm, he is not a Murderer, he is not to die, but to be delivered from the avenger of blood. So that theſe three laſt verſes are a plain limitation of all that went before; the inſtrument, whatever it was, was to raiſe a preſumption, if a mortal one: But yet if it appear the perſon was not *thruſt*, or *hurled* at, or *ſmitten* in *enmity*, &c. the ſlayer was to be delivered from the avenger of blood.

Neither can it ſtumble your Lordſhips, that in the 22d verſ. are theſe words, *ſeeing him not*, as if this were

were one of the requiſites neceſſary for the ſlayer's ſafety, that he did not ſee the man whom he thruſt at, or killed with a ſtone, though not done in enmity: For, *firſt*, 'Tis impoſſible to imagine, that the words, *ſeeing him not*, however they might refer to the caſe of throwing a ſtone, can have any reference to the words, *thruſting without enmity*. How can a man thurſt at him whom he ſeeth not? or, How can he ſmite him whom he ſeeth not, in any proper ſenſe of Smiting? And therefore 'tis plain that, as to the thruſting, the only limitation is, that it be done without enmity. But, 2*do*, Your Lordſhips will obſerve, that the word *Him* in that ſentence, *ſeeing him not*, is not at all in the original; it is an adjection of the Tranſlators, and as ſuch, is diſtinguiſhed in different characters in any correct editions of our Bibles, and indeed is an erroneous adjection: The words ſhould be only *ſeeing not*; and perhaps the tranſlations ought not at all to be by the participle *ſeeing*, but, according to the Idiom of the *Latin* language, by an adjective, ſuch as, *improvidus*, *imprudens*, or the like; and, according to our language, by a ſubſtantive and adverb, ſuch as, *without foreſight*: And ſo the *Septuagint* does tranſlate it in theſe words, οὐκ εἰδώς, which, in our language, is directly *without foreſight*, that is, without premeditation or anterior deſign to give the ſtroke. And ſo the ſenſe comes out, that where a thurſt or blow of that kind is given, without enmity, foreſight and premeditation; or, in other words, *ſine dolo*, that there death was not to follow, but the ſlayer to have the benefit of the City of refuge. And that the moſt ancient lawyers, and *Jewiſh* Doctors themſelves, have underſtood the ſcope of the *Moſaick* law to be ſuch, is the next point we are to endeavour to ſhew your Lordſhips.

And, in the *firſt* place, We beg leave to refer to an

an ancient treatiſe, called *Moſaicarum & Romanarum Legum Collatio*, laſt publiſhed by the learned *Schulten*, with his own notes upon it; in the firſt *Tit.* of which, *De homicidiis caſu, V. voluntate*, § 5. are thoſe words, *Item de caſualibus homicidis* Moiſes *legaliter dicit, Si autem non per inimicitias immiſerit ſuper eum aliquod vas non inſidians, vel lapidem, quo moriatur*, non per dolum (your Lordſhips will pleaſe mark thoſe laſt words) *& ceciderit ſuper eum, & mortuus fuerit, ſi neque inimicus ejus*, &c. *liberabitis percuſſorem.* Here is directly ſet down, by way of paraphraſe, the ſenſe of the 23d *verſe* of the xxxv. *Chap.* of *Numb.* before cited; and in place of theſe words, *ſeeing not*, the paraphaſe of this ancient Collater is expreſt by theſe words, *non per dolum*; which ſhews what underſtanding he had of the words, directly congruous to what we have above ſet down, and, as we apprehend, to be the *Septuagint* tranſlation; and this paraphraſe the annotator approves of as the juſt meaning of the text.

But we beg leave to give your Lordſhips another great authority, who founds his opinion upon the notions of the *Jewiſh* Doctors, or rather ſets forth what they all agreed on to be the import of the *Moſaick* law on this head, and that is the great and learned *Selden*, in his treatiſe, *De jure naturali & gentium, juxta diſciplinam Hebræorum, Lib.* 4. *Cap.* 2. The title of which is, *De homicidio involuntario, ſeu quod caſu factum aut errore.* There the learned Author takes notice of all the texts upon this ſubject, and of the *Jewiſh* Doctors who had wrote upon it, whoſe names we need not trouble your Lordſhips to repeat, but refer to the quotations *Selden* makes. That learned author takes notice of three ſorts of Homicide, which he and the *Jewiſh* Doctors reckoned to be involuntary, according to the *Moſaick* law, and not to be puniſhed with death: The *Firſt* is, what

what is merely accidental, The *Second* is, where the killing was not merely accidental, but as he expreſſes it, *prope accedens ad violentiam.* The *Third* we beg leave to ſet down in his own words, as coming up directly to our caſe. *Tertia autem homicidii involuntarii ſpecies eſt, ubi qui alium occidit ex errore quidem aut ignorantia, quæ tamen prope accedit ad id quod ſpontaneum eſt ſeu voluntarium; veluti ubi quis alterum occidere volens, alterum jactu aliterve perimit, aut ubi jactu ſive ſaxi ſive teli in hominum cœtum, cujus nec ignarus qui jecerit quis occiſus: adeoque intervenerit culpa latiſſima. Ex tribus hiſce homicidii involuntarii ſpeciebus, nulla eſt quæ morte ex ſententia forenſi ordinaria, ſive in Ebræo aliove circumciſo, ſive in proſelyto domicilii, aut genitli alio puniretur. Nam in univerſum pronunciant, homicidam nullum, ſeu qui non ſponte ſcelus patraret, ſic foro puniendum.* Yea, he goes further, That, in this laſt caſe, according to the *Jewiſh* Doctors opinion, there was no need of going to the city of refuge, for that the avenger of blood had not a power in that caſe to kill.

We apprehend, nothing can be more direct or ſtrong to the preſent caſe, than that authority which is laid down, as the univerſal opinion of the *Jewiſh* Doctors, which we hope does does deſerve ſome regard in the interpretation of the *Moſaick* law.

And this naturally leads us further to obſerve to your Lordſhips what we inſinuated before, that the queſtion ſtarted by *Roman* and *modern* lawyers, how far a perſon that intends to kill one man, is liable to the pain of death if he kill another? hath no foundation in the *Moſaick* law, either from the texts, or the opinion of thoſe *Jewiſh* Doctors. As to the *laſt*, your Lordſhips ſee, that *Selden* from them, directly ſtates the caſe, *ubi quis alterum occidere volens, alterum jactu aliterve perimit*; and he and they determine that to be an involuntary homicide, not puniſhable

puniſhable with death; and we apprehend, that in this they are founded in the words of all the texts, *If any man hate his neighbour, and ly in wait for him, and riſe up againſt him, and ſmite him mortally, that he die:* Not one word here of riſing up againſt one and killing another; not a word of hating one, and in conſequence of that hatred killing another: That was a caſe which did not fall under that law. The hatred and the riſing up, was, by that law, to be againſt the man who was killed; if another by fatality happen to be killed, that was a different caſe, it was an involuntary homicide; the crime there was not the killing, but ſtood upon the riſing up againſt him who was not killed; and ſo the puniſhment was for invaſion, but not for killing. The texts in the book of *Numbers* are all to the ſame purpoſe: *If he ſmite him who is killed of hatred, or hurl at him by laying of wait that he die, or in enmity ſmite with his hand that he die,* &c. where all the rules are ſtill directed towards the perſon alone that is killed; and that of killing another, when the ſtroke was not deſigned at him, is quite left out of the caſe. And the application of this reaſoning to the preſent unhappy accident, is too evident to need enlargement. If it appear that the puſh was aimed at *Bridgeton*, that the enmity was againſt him, and not againſt the deceaſed Lord: then, whatever be the conſtitution of the *Roman*, or more modern laws, the preſent caſe is quite out of the deſcription of the *Moſaick* law, concerning this article of manſlaughter.

What hath been already ſaid at ſo great length, does fully obviate what is offered in the Purſuers information in way of anſwer. It is true, that the general rule in the divine law is, *That whoſo ſheddeth man's blood, by man ſhall his blood be ſhed*; and ſo, by the ſixth commandment, the prohibition is general, *Thou ſhalt not kill:* Yet even the command-

ment itſelf admits of exceptions; ſuch as, killing in ſelf-defence, and killing in execution of juſtice, and killing in proſecution of juſt war, and the like. The other rule likewiſe admits of exceptions, not ſo as entirely to juſtify the killing, and to make the act lawful, but yet ſo as to excuſe from the pain of death. The texts already noticed are expreſs, that a man's blood may be ſhed, and yet the blood of the ſhedder not be required on that account. The queſtion is, whether this misfortunate Pannel's caſe comes not under the exceptions? And that we have already diſcuſſed.

THE poſition, "That, by the law of *Moſes*, death "of a ſuddenty was plainly capital, and that the ſlay-"er had the benefit of the city of refuge, only "where the ſlaughter was by mere misfortune," is aſſumed without ſufficient foundation. 'Tis plain, that he who thruſts without enmity, does not kill the man by mere caſualty: The act from which death follows, is a voluntary act, altho' without enmity: And altho' the killing is involuntary, and ſo can never be ſaid to be merely caſual in the ſenſe the Purſuers would take the words; neither are the words in *Exodus*, *If a man ly not in wait, but GOD deliver him into his hand*, in the leaſt contrary to what hath been advanced: For it is moſt properly ſaid, that where the act is without the deſign of the killer, without enmity, and without hatred; that there, in ſo far as concerns the killing, GOD hath delivered the man into the hand of the ſlayer. The plain meaning is, That where a man is killed, not with deſign, but that the thing happens by the over-ruling hand of providence, permitting things of that kind, in his ſovereign wiſdom, and from his ſupreme power; that there the perſon is delivered to death by the over-ruling hand of GOD. And where could ever this be more properly applied, than on the preſent melancholy

melancholy occaſion, when the providential turning about of the unfortunate deceaſed Lord, occaſioned his receiving the fatal wound?

It is likewiſe a poſition aſſumed without reaſon, "That wherever a man was killed by a mortal weapon, that was murder by the *Moſaic* Law." We hope we have already demonſtrated the contrary. If enmity and forethought was required, (and we need only repeat that one text, which expreſſes the killing a man with a ſtone, wherewith he may die), there the text declares the ſtone to be a mortal weapon; yet for all that, in caſe of the circumſtances mentioned in the other verſe, the ſlayer was not to die, but to be delivered from the avenger of blood: And this ſingle conſideration muſt be ſufficient to refute ſuch a poſition. Is it not poſſible for a man to uſe a mortal weapon, where there is no enmity, nor deſign to kill the perſon who is ſlain? If it be poſſible, as it certainly is, then can we imagine that a law, ſo perfect as the divine law itſelf, could make a man guilty of murder, becauſe of the uſe of ſuch a weapon, where he really intended no more harm, than a man that uſed a weapon of another kind? Beſides, that in truth every weapon is a mortal weapon with which a man may be killed: And therefore, to imagine that the divine law laid ſuch a difference betwixt an inſtrument of iron, and one of another kind, is certainly to go too far. The law of God has put the matter upon a much juſter footing, to wit, the intention of the perſon; which alone can diſtinguiſh his actions.

The Purſuers alſo ſay, "That though the argument is good, That wherever the benefit of the city of refuge was not competent, there the crime was capital; yet it does not follow, that where the power of the laws were ſuſpended, by the *jus aſyli*

" *aſyli*, that the puniſhment is not to be capital in a " country where the *jus aſyli* takes no place."

But, with ſubmiſſion, this is no ſolid way of arguing: the queſtion hitherto treated is, What was the law of *Moſes*, with regard to puniſhments in the caſe of Manſlaughter? If the puniſhment in any caſe was not capital, becauſe of the privilege of the *aſylum*, the concluſion is juſt, That the All-wiſe God did not intend ſuch puniſhments ſhould be inflicted for ſuch an offence, and the form of granting the protection for the puniſhment, does not alter the ſubſtance of the law.

The *next* point undertaken to be illuſtrated is, That Manſlaughter, under ſuch circumſtances as occur in the preſent caſe, was not, by the common law, puniſhable by death: And this argument muſt indeed be divided into ſeveral branches, ſuch as, 1*mo*, That culpable Homicide was not ſo puniſhable, and that Homicide committed upon ſuch high provocation, as was here given by *Bridgeton*, could amount to culpable Homicide only. 2*do*, That by that law, the deceaſed Lord not having been intended to be killed, but the invaſion, whatever it was, intended againſt another; the killing the Earl was caſual, or at worſt culpable, not puniſhable with death.

And as to the *firſt* of theſe points, we ſhall not trouble your Lordſhips with infinity of laws and opinions of Lawyers that might be adduced upon the point, but only take notice of ſome of the moſt remarkable, and which ſeem moſt appoſite to the preſent caſe. And in the *firſt* place, The foundation of the *Roman* law on this point, appears to have been laid down as early as the days of *Numa:* For the *Roman* writers take notice of a law of his in theſe words; *In Numæ legibus cautum eſt, ut ſi quis imprudens hominem occidiſſet, pro capite occiſi & natis ejus in concione offerret arietem.* This law is taken notice of by

by *Pithaeus*, in his annotations upon the forecited ancient treatiſe, comparing the *Moſaic* and *Roman* law, with regard to this head of Manſlaughter, as agreeing preciſely with the law of *Moſes*; and the plain meaning of it is, That where a man kills another, altho' culpably, yet if it be *ſine dolo per imprudentiam*, he is not to ſuffer death, but to make an aſſythment to the neareſt relations of the perſon killed: And the ſame treatiſe takes notice of a reſcript of *Adrian*'s to the ſame purpoſe, directed to *Taurinus Ignatius*, approving of a judgment given in the caſe of one *Marius Evariſtus*, whereby the Proconſul had mitigated the puniſhment of Mauſlaughter upon that ground, That ſuppoſe it was done *per laſciviam*, and culpably, yet it was *ſine dolo*. The words of the Reſcript are, *Pœnam Marii Evariſti rectè, Ignate Taurine moderatus es ad modum culpæ; refert enim, & in majoribus delictis conſulto alio quod admittatur an caſu; & ſane in omnibus criminibus diſtinctio hæc pœnam aut juſtitiam provocare debet aut temperamentum admittere.* And *Schulten* in his annotations, explains what is meant by *caſu*, in theſe words; *Per caſum hic intelligitur fieri quod non fit dolo, quomodo et quod impetu fit, caſu dicitur fieri*, l. 1. § 3. ad leg. Cornel. de Siccar. *Ubi pro cauſa, editiones veteres & gloſſam rectè haberi caſu certiſſimum eſt.* Which by the by, ſhows how erroneous the Purſuers interpretation of the words *caſus* or *caſual* is, when they would reſtrict them to what is done by mere accident.

The general rules of the civil law are plain on this point, That it is the *animus qui maleficia diſtinguit*; That there can be no murder, *ſine animo occidendi*. But theſe general topics need not be inſiſted on, where the texts themſelves are ſo expreſs, ſuch as not only theſe already mentioned, but even that *l.* 1. § 3. *ad leg. Corn. de Siccar. Divus Adrianus reſcripſit, eum qui hominem occidit, ſi non occidendi animo hoc admiſit, abſolvi poſſe.* And a little after, *Et ex re conſtituendum*

hoc

hoc, nam ſi gladium ſtrixerit, & in eo percuſſerit, indubitate occidendi animo id eum admiſiſſe. But then he adds the exception, *Sed ſi clavi percuſſit, aut cuccuma in rixa: quamvis ferro percuſſerit, tamen non occidendi animo, leniendam pœnam ejus qui in rixa caſu magis quam voluntate homicidium admiſit.* It is true that the Purſuers, and indeed ſeveral of the Doctors, endeavour to turn this text the other way, by a plainly erroneus interpretation and wrong pointing of the text. They pretend, "That where a wound is given by a "ſword, there the *animus* is undoubtedly preſumed;" and ſo far right as to the rule. But then the law ſets down the exceptions; *firſt*, If the ſtroke be *clavi aut cuccuma*, ſuppoſe theſe be mortal weapons wherewith a man may die, yet becauſe they are not inſtruments expreſsly made for death, the preſumption is, that *aberat animus occidendi*, unleſs circumſtances make it appear otherwiſe. Then the *ſecond* exception is *in rixa, quamvis ferro percuſſerit*, although a man ſtrike with a ſword, yet if it be *in rixa*, ſuddenly, or upon a provocation given, *tamen non occidendi animo, leniendam pœnam*, becauſe *in rixa, caſu magis quam voluntate homicidium admiſit.* Thoſe Doctors indeed who go wrong in the interpretation of this text, pretend, That the meaning of *quamvis ferro* is not, although he ſtrike with a ſword, but would make the meaning to be, *Although he ſtruck with an inſtrument of iron*, and ſo make the word *ferrum*, and alſo thoſe words, *in rixa*, refer to other words, *clave aut cuccuma*; ſo as that the ſenſe ſhould be, if a man ſtrike, *clave aut cuccuma in rixa*, although theſe be inſtruments of iron, he is not preſumed to have had the *animus occidendi*. But, with ſubmiſſion, as both the learned *Noodt* and *Schulten*, obſerve upon that law, the interpretation is ſtrained, and indeed illiterate: For the word *ferrum* is never uſed in law in that ſenſe, but always does ſignify a ſword; and ſo the expreſſion is the ſame, but ornately

ornately repeated in other words, as if the Emperor had ſaid, *in rixa quamvis gladio percuſſerit:* And ſo the ſenſe is, that the *animus* is in general preſumed from the uſing a ſword, that it is not preſumed where the inſtrument is not an inſtrument made for death; but if the killing happen *in rixa*, the *animus* is not preſumed, although the ſtroke be given with a ſword.

And this is likewiſe the opinion of the learned *Grotius*, in his annotations upon the text, in *Numbers* above cited, verſe 16. which, in the *Latin* tranſlation, is rendered, *Si quis ferro percuſſerit*; on which *Grotius* hath this note, *Mos Ebraeorum multis verbis rem circumloqui. Senſus eſt; mortis eſſe pœnam qualicunque telo quis hominem occiderit. Ex telo præſumitur malum concilium, niſi contrarium appareat.* There your Lordſhips ſee that author's opinion is as we plead, that the uſing a mortal weapon preſumes the deſign, but not *præſumptione juris & de jure*; for he adds, *niſi contrarium appareat.*

The reſcript of the Emperor *Antonine* is likewiſe as expreſs on this head as can be, *l.* 1. *Cod. de Siccar. Frater veſter rectius fecerit, ſi ſe præſidi provinciæ obtulerit. Qui ſi probaverit, non occidendi animo hominem a ſe percuſſum eſſe, remiſſa homicidii pœna, ſecundum diſciplinam militarem ſententiam proferet: crimen enim contrahitur, ſi et voluntas nocendi intercedat, cæterum ea quae ex improviſo caſu potius quam fraude accidunt, fato plerumque non noxae imputantur.* Here the Emperor plainly ſets down theſe two things, *firſt*, That *pœna homicidii eſt remittenda, ſi animum occidendi non habuerit.* 2*do*, That where the thing is done *ex improviſo*, there there is no *animus*; that 'tis to be looked upon as done *caſu*, by fatality, rather than crime: But nevertheleſs, that in ſuch a caſe there may be an arbitrary puniſhment.

The Doctors of the *Roman* law ſeem to be unanimous on this general point. *Carpzovius*, one of the ſevereſt criminaliſts, is moſt expreſs upon it;

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Ceſſat porro pœna ordinaria homicidii, ſi culpa vel caſu fuiſſet commiſſum homicidium; and goes on, *quod adeo verume ſt, ut in homicidio lata culpa, dolo non aequiparetur. Clarus* is likewiſe as expreſs upon this general head; and ſuch ſhoals of others are by them quoted and referred to, that it were vain to repeat their names, or trouble your Lordſhips with quoting their words. We don't know that any lawyer of reputation differs upon the general point.

But then indeed the queſtion comes, what is culpable homicide? And whether the preſent caſe falls under that deſcription? which is next to be illuſtrated. And here we humbly inſiſt, that where the homicide is committed upon a ſudden quarrel, and provocation given, eſpecially by real injury, and that quarrel begun not by the killer; that this is no more than culpable homicide: And for this, in the *firſt* place, we oppone the law already cited, *in rixa quamvis ferro percuſſerit.* And to the ſame purpoſe is the firſt law, §. 5. *ff. ad ſenat. conſult. Turpilianum*, the *l.* 2. *Cod. de abolit.* and the §. 2. *l.* 16. *de pœnis*; the words of which we ſhall not trouble your Lordſhips with repeating, becauſe they are the common texts founded upon by Doctors on this head. We have likewiſe for us the authority of all the ancient moral philoſophers; ſuch as, *Ariſtotle*, *Plato*, *Plutarch*, and many others, likewiſe commonly taken notice of by the lawyers on this ſubject. It is true, ſome of the ſevereſt criminaliſts, ſuch as *Matthæus* and *Carpzovius*, don't admit the rule in general, but ſtill they admit as much as is neceſſary in the preſent queſtion: They don't allow, that where the killer is *auctor rixæ*, that he is at all to be excuſed, although the killing happen *in calore iracundiæ*; but then moſt of them do admit it, if the killer be not the *author rixae*, but be the perſon provoked, to whom a juſt provocation has been given, eſpecially by a real injury: and ſo particularly

Carpzovius

Carpzovius, one of the ſevereſt, after he has argued at length againſt the general point, concludes in his *Quæſtio* 6. §§ 14. and 16. *Nihil quoque adverſatur regula adducta, quod ſcilicet delictum ira commiſſum, mitius puniri ſolcat; quia hæc regula de ira ex juſta cauſa proveniente accipienda eſt: duplex etenim ira eſt, alia ex juſta cauſa provenit, quæ ſi non in totum, tamen ex parte excuſat, ut delinquens mitius puniatur; alio vero non provenit ex juſta cauſa, quæ in nihilo excuſat.* Then he adds, *Hæc diſtinctio communiter recepta eſt ab interpretibus*, and cites ſeverals. And then concludes, *Si ergo juſta cauſa calorem iracundiæ præcedat, veluti ſi quis ab alio fuerit provocatus, aut alio modo offenſus, tunc is qui ira et intenſo dolore permotus, provocantem ſeu offendentem interficit, abſque dubio a pœna ordinaria liberabitur; ſecus vero ſi quis, abſque juſta et probabili cauſa iratus aliquem occidat, de quo caſu nos hic loquimur, qui pœnæ homicidii ordinariæ neutiquam eſt eximendus.* And then takes notice, that the practice in the court of *Lipſwick* is agreeable to this.

THERE is an adjudged caſe very appoſite, publiſhed in a book, called *Alphonſi Villagut Neapolitani Conſultationes Deciſivæ*, very learnedly reſolved. It is the *Deciſio* 29. We ſhall ſtate the caſe in the words of the Author, *Quidam nobilis Raguſinus fuiſſet verberatus, extra (ſed prope) eccleſiam ſanctæ crucis caſtri Gravoſæ, a quodam alio nobili Raguſino, in eodem pacto evaginavit pugnionem contra dictum verberantem, ac in fugam jam converſum & ipſum inſequens, unico vulnere ſibi inflicto in dicta eccleſia (quam ille ingreſſus fuerat) dictam eccleſiam egrediens ſeſe in fugam dedit, & cum dictus verberator, ex dicto unico inflicto vulnere intra dictam eccleſiam mortuus eſſet.* The caſe came to be be tried, at leaſt the queſtions upon it, to be reſolved by the ſaid *Alphonſus*; where ſeveral queſtions occurred, but thoſe which are moſt applicable to the preſent caſe are two: Firſt, *An hujuſmodi homicidium in eccleſia perpetratum fuerat dicendum voluntarium nec ne, eo quod dictus nobilis in ſecutus fuiſſet illum ceſſantem a verberibus inferendis, ac ſic unico vulnere inflicto interfeciſſet?* The ſecond queſtion is *An dictus nobilis prædicto modo ac de cauſa violans dictam immunitatem eccleſiaſticum, veniat in foro ſeculari, & eccleſiaſtico pœna ordinaria plectendus, vel ſolum mitiori pœna?* The reſolution upon the firſt queſtion is, That though, at firſt view, the Homicide might ſeem voluntary, *Eo quod dictus*

nobilis, nemine ipſum compellente, fugientem hominem vulneraverit, nihilominus nullo pacto fore judicandum homicidium voluntarium, aut pro tali dictum nobilem puniendum. The reaſons for this reſolution are ſet down with great learning and judgment, but are ſo long, that 'tis impoſſible to repeat them: *firſt*, They are taken from the definition of voluntary homicide. *2do*, From the texts of the Roman Law, and the opinion of doctors. *3tio*, From that particular, that the nobleman had been immediately ſtruck before; on which the words are remarkable, *Ex hoc ergo articulo, appertiſſimi elicitur homicidium hujuſmodi fuiſſe caſuale, & non voluntarium, nam nulla mora interjacente, evaginato pugnione, ipſe nobilis bacculo percuſſus in ſecutus fuit dictum percuſſorem jam fugientem, & hoc pro honoris proprii redemptione, ut ſic ſe tueretur ab injuria corporali recepta ex verberibus:* After which follows a long reaſoning, all in the Pannel's favours. And this caſe we take the more notice of, becauſe the purſuers pretended to make a diſtinction betwixt the caſe of a wound given the very moment a real injury is done, and the like given after the injurer has deſiſted from beating, and retired to ſome diſtance; but there is no difference, except the interval be ſo long, as it can be ſuppoſed the thought of the perſon injured was cool. The other queſtion is likewiſe reſolved in favour of the accuſed, that in ſuch a caſe, not the ordinary puniſhment, either eccleſiaſtical or civil, ought to take place, but only the *pœna mitior*, and confirmed by very ſtrong reaſons, which we cannot recite, but refer to.

Amongst other authors that might be cited for ſupporting this opinion, is the learned Voet, in the very ſection cited by the purſuers, *ad tit. ad leg. com. de ſic. n.* 9. where, after he has ſaid what is cited for them, that one killing another who has provoked him only by a verbal or ſlight injury, *vix eſt ut ab ordinaria pœna abſolvendus ſit*; he adds, that if the provocation was by an atrocious real injury, that would be ſufficient

ficient to mitigate the ordinary puniſhment; and to confirm that, cites *Mathæus Berlichius*, &c. And the Reaſon given by theſe authors for making this allowance, in caſe of juſt provocation, is expreſt in theſe words by *Gothofred*, *ad l.* 17. *d. t. Quod ei ſit ignoſcendum, qui provocatus ſe ulciſci voluit, quique juſtum dolorem proſequitur.*

And indeed we apprehend this opinion is founded in the firſt principle of nature; for ſcarce any humane conſtancy can ſuffer ſuch high real injury, without the paſſions being inflamed: And although killing is no doubt an exceſs in the retortion of a real injury, yet ſtill it is but an exceſs, and the injury ſhews the thing done without deſign; and therefore, becauſe of inſuperable human weakneſs, the puniſhment falls to be mitigated. And the application to the preſent caſe, as we apprehend, is obvious; *Bridgeton* had given the higheſt provocation, not only by a tract of verbal injuries and endeavours to pick a quarrel, but had committed the moſt provoking real injury, to throw a gentleman over head and ears in a dirty puddle, in the middle of a town, and ſight of ſo many on-lookers; no injury could be more provoking. Yea indeed there was more in it than an injury only: One that was able to throw the Pannel into the puddle in that manner, was likewiſe able to have ſuffocated him there; the Pannel had no reaſon to expect otherwiſe, and therefore no wonder if he betook himſelf to his ſword. And the other circumſtance noticed, that *Bridgeton*, immediately upon the doing the thing, endeavoured to draw, and make himſelf maſter of my Lord *Strathmore*'s ſword, gave the Pannel ground to expect the worſt; and ſo it may be doubted, if he was obliged to wait till *Bridgeton* ſhould have an opportunity to give him the blow, even with a mortal weapon. And when this is conſidered, the fact goes further than a retortion of the higheſt injury:

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The Pannel was in ſome meaſure put upon his defence; and granting that his puſhing at *Bridgeton* was an exceſs, yet ſtill that exceſs falls only to be puniſhed *pœna extraordinaria*.

All lawyers diſtinguiſh exceſſes of that ſort into three kinds, that of time, place, and weapon that is uſed; and exceſs in point of time is puniſhed even with death, where the interval is great; becauſe that interval preſumes fraud and deliberation: But here was no exceſs of time; the thing was done *ex incontinenti*, when the injury was freſh and recent. There is likewiſe exceſs in point of place, when the injurer is allowed to retire to a conſiderable diſtance from the place where the injury is given; and this is in ſome meaſure coincident with the other, becauſe it implies an interval of time: Yet if it be not great, the lawyers hold it to be only puniſhable arbitrarily. And then the third is the exceſs in the uſe of the weapon, where there is no interval of time or place; and that is always agreed to be puniſhable only arbitrarily, where the provocation is high.

From what is ſaid it ſeems plain, that if *Bridgeton* had received the thruſt, the homicide would have been culpable only; and ſo it remains to be conſidered, if the caſe comes out worſe for the Pannel, becauſe it was my Lord *Strathmore* that received the wound, and not *Bridgeton*. And we apprehend it does not, but on the contrary, that this gives a great ſtrength to the defence: And that becauſe, 1*mo*, The puſh being deſigned at *Bridgeton*, ſhows that there was no malice at my Lord *Strathmore*, neither premeditated, nor preſumed from the giving of the wound: For admitting it to be true, that in an ordinary caſe, the giving a wound with a mortal weapon preſumes the dole or malevolous intention; yet that can never be, where the puſh is pointed at another than him who by fatality receives it. And ſo the

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caſe comes out thus, That the Pannel in making one puſh, could not deſign it at two perſons; and ſo if he deſigned it a *Bridgeton*, 'tis impoſſible to ſay he had a deſign againſt my Lord *Strathmore*. It is plain in the nature of the thing, that the deſign, though preſumed from the giving the wound, yet in point of time it precedes the actual receiving of the wound, although that preceding or precedence be but momentary; and therefore, if in the very act of puſhing, the deſign appears to have been againſt *Bridgeton*, it excludes all pretence of any *animus* againſt another who received the wound by fatality, in the very moment that the deſign was pointed againſt the other.

And here your Lordſhips will likewiſe obſerve, that there can be no *animus occidendi* preſumed at all againſt any man, not even againſt *Bridgeton* himſelf; becauſe the drawing a ſword, and puſhing at a man with it, does not of itſelf preſume a deſign to kill the man puſhed at, except the wound, and death actually follow: for it is from the event of the wound, and death following alone, that the intention is preſumed. Therefore ſince death did not happen to *Bridgeton*, the Law cannot preſume an intention to kill him; ſince the foundation of the preſumption is removed, or did not happen. If the blow had miſſed him, or had not killed, but wounded him; the intention would not be preſumed: And therefore it cannot here be preſumed, as the caſe happened; for there is no ſuch preſumption in Law, as that killing one preſumes a deſign to kill another; except where it appears that the ſlayer killed one man by miſtake, taking him to be another; As for inſtance, killing *Caius* in the dark, when the killer really believed him to be *Titius*; there indeed the killing of *Caius* preſumes the intention of killing *Titius*, although he was not actually ſlain: And therefore in that caſe the killer is indeed guilty

guilty of murder. But 'tis quite another caſe, where one man is killed, not by miſtake for another, but by fatality, when the puſh was intended at another, whom the killer knew; which is the caſe in hand. And therefore we do humbly inſiſt, that it cannot be ſaid there was an intention to kill *Bridgeton*, ſince his death did not follow. Neither can it be ſaid there was an intention to kill the Earl of *Strathmore*; becauſe, though his death did moſt unluckily happen, yet the *initium*, upon which the intention muſt be founded, did not happen, the puſh being made at *Bridgeton*; for thoſe two muſt always concur, the puſh made at the man who dies, and the actual death: And where it happens otherwiſe, the death is a mere fatality; not intirely innocent, becauſe the killer was ſo far faulty in invading the other; but then it is no more than an invaſion; it is not murder from malice preſumed. No preſumption of law can get the better of contrary evidence: The preſumption of law may be, That where a man is killed, he was intended to be killed: But if from the circumſtances the direct contrary appear, that there was no intention againſt him; this is evidence which excludes the preſumption; and ſo there can be no murder in the caſe.

It is indeed a caſe ſtated by the lawyers, what ſhould be the conſequence, if a perſon intending to kill one man, kill another? And we acknowledge they are greatly divided among themſelves upon the queſtion; a great many of the ableſt of them are in all caſes clear, that where one man is killed, and another was deſigned, it cannot be murder, becauſe of the want of an intention againſt him. *Bartolus*, *Farinacius*, *Gomeſius*, *Menochius*, and numbers of others quoted by them, are plain in that opinion, and give an account of ſeveral judgments of the courts of *Mantua*, and *Naples* and others, to that purpoſe; and *Farinacius* ſays, that it is the common opinion, *Et ab hac ſententia*

tentia in judicando non esse recedendum. And however other lawyers may seem to differ, yet in the *first* place, the divine law, for any thing that can be found in it, is on this side; because it plainly speaks only of hating him, and rising up against him who happen actually to be killed, and mentions no such case as deserving death, as this of rising up against one man, and by fatality killing another. 2*do*, That this was the opinion of the *Jewish* Doctors, is plainly from the quotation already brought from *Selden*, where this very thing of killing one man in place of another is made part of the third case stated of involuntary homicide, and determined not to be capital. But 3*tio*, Those lawyers who at first view seem to differ, do really not differ, when the cases are distinguished: For what they plainly mean, is only where a man by mistake kills *Titius*, believing him to be *Mevius*. This we admit is capital, for reasons before given; but not the other of killing one by fatality, and not for another, but directing the blow at the other.

But then your Lordships will observe, that all lawyers agree in this, That wherever a man is to suffer for killing one, when he intended to kill another; that can only be where the forethought and dolose intention to kill the other is certain, but not where the invasion is *ex impetu:* And therefore supposing one invade another, with an intention to hurt, or *percutere*, as the lawyers call it, but without a certain evidence that his thorough intention was to kill; there, supposing the blow intended for one do kill another, the killer cannot suffer death: And which by the bye shows your Lordships, that there is no such presumption in law, as, That because the push killed the Earl of *Strathmore*, therefore the Pannel intended to kill *Bridgeton*; for if that were law, then the question could never occur, but would be inept, Whether a man

man intending to kill one and killing another with that blow, is guilty of murder, or is presumed to have intended to kill that other at whom the stroke was intended? We shall trouble your Lordships only with two authorities on this point, which are very direct to the case: The first is that of *Berlichius*, which we the rather notice, because he seems to be against us on the general point; after discussing which, he hath these words, speaking of his own opinion, *Fallit, si quis aliquem non occidere, sed percutere tantum, volens, alium præter intentionem percutiat ut moriatur.* From this your Lordships see, that it is no consequence, That because the thrust killed my Lord *Strathmore*, therefore it should be presumed the Pannel intended to kill *Bridgeton*: If that were true, that Lawyers position, from whom no body differs, must be direct nonsense. And therefore since there is no other evidence of a further intention against *Bridgeton* than *percutere*, except it arise from the death of my Lord *Strathmore*; and that his death cannot presume it; we are directly under the position the lawyer lays down, That though my Lord was unhappily killed, yet the Pannel ought not to suffer death, where it does not appear that he intended to do more than to push at *Bridgeton* at random, *percutere*, without a certain design to kill.

But this is yet more plainly laid down by another very distinct lawyer, *Masurius Labio*, in his treatise called, *Homicida excusatus, cap.* 35. where treating of this very question, he first notices, that if the killer was *occupatus in re licita*, such as defending against any aggressor, which in some measure is the case here, that then he is not liable, although he chance to kill a third party: But then he goes further, *Aut etiam, ut amplius dicta extendamus, reus quantumvis in re illicita occupatus, tali tamen in casu constitutus fuit, ut si Caium interfecisset, non nisi culpæ reus futuris fuisset, ejusque loco cum infelici*

infelici fato Sempronius lethalem acceperit ictum, magis eſt, ut reus hoc ipſo cauſam ſuam non gravaſſe cenſeri debeat: cum enim Caii internecione mortem meritus non fuiſſet, certe imprudentia atque in facto error magis eum à Sempronii cæde excuſare debet: atque Caio potius, ſi is vel rixæ auctor fuerit, vel iracundiam alterius juſtam provocaverit, id quod inde ſecutum, imputandum reor. Here your Lordſhips ſee he is ſtating the caſe of a *Rixa*, where one had given provocation as *Bridgeton* did; he indeed ſuppoſes that in ſuch a caſe killing the provoker ought not to infer death; much leſs, ſays he, the *accidental killing of a third party*: And your Lordſhips will obſerve he aſſerts further, that the provoker, or *auctor rixæ*, is rather to be judged guilty of the ſlaughter.

And a little after, he comes yet cloſer to the preſent caſe: *Quod ſi tamen Caium adverſarium occidere nollet, ſed illi tantum nocere, Sempronium autem imprudenter ſe ictui objicientem, eo ipſo interemerit, tunc certe imprudentia Sempronii delictum rei aggravare non debet; ſi enim is moderatorem rixæ ſe non obtuliſſet, corpuſque ſuum ſubito & ex propinquo non objeciſſet, Caius a cædente forte remotior, non niſi vulnus aliamve noxam inde reportaſſet, unde Sempronio mors oblata eſt: excuſandus ergo a tanto merito percuſſor tunc, cum occidendi animus hic non adfuiſſe apparet.*

This is ſo appoſite to the preſent queſtion, that one would think it were a reſolution on the caſe; For by that your Lordſhips ſee, that notwithſtanding one's being killed, the author ſays it does not from thence appear, that there was an intention to kill the other: The other, who, as being at a greater diſtance, might not have been killed, might only have been hurt and wounded, although the perſon that came unhappily in the way happened to be killed. This is juſt what we have pled, That it does not appear there was an intention to kill *Bridgeton*, becauſe he might not have been killed, but he might only have been hurt or wounded; and therefore the Pannel ought

not to ſuffer death, becauſe of the fatality of killing the deceaſed Lord, *qui ſubito corpus ſuum ex propinquo objecit.* And upon all thoſe grounds, we humbly inſiſt, that if *Bridgeton* had been killed, there would have been no place for a capital puniſhment: But then ſeparately, whatever be in that, that ſince it does not appear, (nor cannot, ſince death did not follow) that there was a certain intention to kill him, the caſual killing of the Earl of *Strathmore* cannot be puniſhable with death.

WHAT has been ſaid, fully removes any argument that may be drawn from Sir George Mackenzie's opinion, "That he who by miſtake kills one for ano-"ther, ſhould die:" For your Lordſhips ſee, that he ſpeaks only of that caſe, when one man is certainly intended to be killed, but another is killed by miſtake, being ſuppoſed to be him: That is not the caſe now before your Lordſhips.

AND in this queſtion, concerning the Pannel's intention and deſign, the circumſtance of his being overtaken with drink, is a circumſtance that aſſiſts in the argument. We do not ſay, that being drunk affords a defence for killing; nevertheleſs it is a circumſtance whereby to ſhow, there was no malice or dole, eſpecially againſt the Earl of *Strathmore*; ſince every body may conceive, how eaſy it is for a man that is drunk, puſhing at one, even to ſtagger upon another, or not to have the judgment and preſence of mind to draw back, when that other ſuddenly throws himſelf in the way of the thruſt.

WHAT is laid down by the Purſuers, in oppoſition to all this, in their Information, is ſo fully obviated, that it is quite needleſs to repeat their argument; only whereas they ſay, "That if killing, not-"withſtanding of provocation, had not been capital, "it could not have been a doubt in the common law, "Whether a huſband ought to ſuffer death, who kil-

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" led his wife taken in the act of adultery?" But we apprehend, that the direct contrary conſequence follows, that if high provocation had not afforded a defence, then indeed there could not have been a doubt, the huſband muſt have died, becauſe high provocation was all that he had to plead: But the doubt was, whether a provocation of that kind, where there was no real corporal injury to the huſband himſelf, was ſufficient? And the law determines that it was; and conſequently eſtabliſhes the rule, That high and grievous provocations ought to alleviate the puniſhment.

The brocard, That *verſans in re illicita tenetur de omni eventu*, affords no argument againſt the Pannel in this caſe; nor indeed hath it been much inſiſted on by the purſuers. 1*mo*, It is not true in many caſes. But 2*do*, It holds in no caſe, except with regard to conſequences or events, that happen with regard to that ſubject, or object againſt whom, or which the unlawful act is directed: As for inſtance, if one ſets fire to a houſe, he is guilty of murder, if a perſon happen to be burnt in that houſe; or if he undermine a houſe, he is liable for all the goods that may be deſtroyed by its fall; but he is not liable for any extrinſic damage that may happen to another ſubject caſually and by accident: And therefore, ſuppoſe it were proved, that one unlawfully invading another, without a deſign to kill, might in ſome caſes be liable, if death followed; yet that can only be with regard to the perſon he invades, but never with regard to what accidentally happens to another perſon. And ſo *Carpzovius* explains the matter, *Qu.* 1. §. *ult.* in theſe words, *Supra dicta enim (quod nempe danti operam rei illicitæ imputari debeat, quicquid fuerit præter ejus intentionem ex eo actu ſecutum) procedunt tantum, quantum ad ſubjectum, circa quod verſatur ipſa malitia illicite operan-*

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tis, & quantum ad ea que illi objecto per ſe & immediate junguntur, aut neceſſario ſequuntur; non autem quoad illa quæ per accidens oriuntur, a re illa mala, cui opera datur. Beſides, 'tis certain, that the brocard is no rule at all in the matter of manſlaughter, otherwiſe there never could be ſuch a thing as culpable homicide; which 'tis plain there is.

THE next thing to be conſidered is, what was and is the law of Scotland concerning this matter? And *firſt*, as to our ancient law, the Purſuers ſeem to be the firſt that ever diſputed, that according to it there was a diſtinction betwixt ſlaughter and murder. Sir George Mackenzie is expreſs upon it. By our law, ſays he, ſlaughter and murder did of old differ, as *homicidium ſimplex et præmeditatum* in the civil law; and murder only committed, as we call it, upon forethought felony, was only properly called murder, and puniſhed as ſuch; for which he quotes the expreſs ſtatute, Parl. 3. cap. 51. K. James I. appointing that murder be capitally puniſhed, but *chaud melle*, or ſlaughter committed upon ſuddenty, ſhall only be puniſhable according to the old laws, and ſeveral other acts of Parliament, to which we beg leave to refer; which expreſsly make the diſtinction betwixt forethought felony, and ſlaughter of ſuddenty: And though none of all theſe laws particularly expreſs the puniſhment of manſlaughter, as they could not well do, becauſe that was arbitrary according to circumſtances; yet, as Sir George obſerves, the oppoſition and diſtinction is eſtabliſhed betwixt ſlaughter by forethought, and *chaud melle*, and the puniſhment of the one to be leſs than that of the other: And therefore, we apprehend, we may leave this point as clear and undoubted.

THE Purſuer has endeavoured, to no manner of purpoſe, to ſet up others of our ancient laws, in oppoſition

oppoſition to thoſe obſerved by Sir George Mackenzie, ſuch as the third ſtatute of King Robert I. which, with ſubmiſſion, is nothing to the purpoſe: For, *firſt*, it does not concern capital crimes only, but any crime touching limb, as well as life. *2do*, Though the word ſlaughter is mentioned, without adding by forethought felony, yet the ſame thing is added in other words, when it ſays, touching *life or limb*, to which alone the act relates, that is, forethought felony; becauſe ſlaughter by *chaud melle* touched neither life nor limb. The title of the act is, *Men condemned to death ſhould not be redeemed.* But what is that to the purpoſe, in a queſtion, Who ſhould be condemned to death, and who not?

THE 43d chap. of the act of King Robert III. is as little to the purpoſe; for as it ſpeaks of hairſhips, burnings, reif, and ſlaughter, 'tis very plain it means only wilful premeditate ſlaughter, otherwiſe it would follow, that not only wilful fire-raiſing, but burning of a houſe by neglect, or *lata culpa*, would infer the pain of death, which no body ever dreamed. And the next paragraph makes it further clear, appointing ſheriffs to take diligent inquiſition, GIF ANY BE COMMON DESTROYERS OF THE COUNTRY, OR HATH DESTROYED THE KING'S LIEGES WITH HAIRSHIP, SLAUGHTER, &c. Can a man be a common deſtroyer by ſlaughter, except where the ſlaughter is ſuppoſed to be by forethought felony? 'Tis certain he cannot; and therefore the Purſuers procurators fall into a great miſtake in law, when they ſay, that gif he be ken'd with the aſſize, *Si attentus fuerit per aſſiſam tanquam talis malefactor, condemnabitur ad mortem*, muſt relate to manſlaughter, becauſe the ſheriff could not judge of murder. It is directly otherwiſe: If he be attainted by the aſſize as ſuch a malefactor, that is, as a common oppreſſor by ſlaughter, *&c.* he is to be condemned to death. This is an exception from

from the rule, that murder was to be tried by the Juſtice-ayr: This law appointed it to be tried in that way, in caſe the perſon accuſed could find his barras or borgh to compear at next Juſtice-ayr; but if he could not, the ſheriff was immediately impowered to try: And by the by, this does not concern particular fact, but concerns that general accuſation of being a common oppreſſor, like to the caſe of a Sorner, or one habite and repute an Egyptian. Nor can the lawyers for the Pannel find any word in the ſtatutes of Alexander II. which the Purſuers refer to, that does in the leaſt preſuppoſe that manſlaughter was capital in them: The direct contrary appears, that manſlayers were to be tried, whether guilty of murder or not; and if found not guilty, that they were to have the benefit of the gyrth. And accordingly Skeen, in his annotations, refers directly to the acts of Parliament, which Sir George Mackenzie takes notice of, eſtabliſhing the diſtinction, and to ſome of the Engliſh acts to the ſame purpoſe.

As to the paſſage cited from Skeen, in his treatiſe of crimes, *tit. Slaughter*, there is certainly a direct blunder in the printing; and inſtead of theſe words, *or caſually by chaud melle*, probably it ought to have been, *not caſually, or by chaud melle*; for otherwiſe he directly contradicts himſelf, and cites acts of Parliament which prove the very contrary of what the Purſuers would make him aſſert: Yea, the very next paragraph eſtabliſheth the diſtinction in theſe words, SUA THAT THE GYRTH OR SANCTUARY IS NAE REFUGE TO HIM WHA COMMITS SLAUGHTER BE FORETHOUGHT FELONY; *ergo* it was a refuge to him that committed ſlaughter, not by forethought felony, and ſaved him even from the arbitrary puniſhment of manſlaughter. And Skeen himſelf, in his explication of the words *chaud melle*, ſays it is in Latin *rixa*, *an hot ſudden tuilzie*, or *debate*, which is oppo-

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ned, as contrary to forethought felony; and cites the act James I. But how is it contrary in our law, if the effect and puniſhment be the ſame? And upon the words *forethought felony*, he in like manner makes the juſt diſtinction, and ſupports it by the authority of *Cicero*, in his treatiſe *de officis*, where he is writing, as a moraliſt, and not as an orator.

THE Purſuers anſwer to the 8th *Act*, 6. *Parl. James* I. is quite trifling; for nothing can be plainer than the oppoſition there ſtated betwixt forethought felony and other ſlaughter: And when the act ſtatutes, THAT IF IT BE FORETHOUGHT FELONY, THE SLAYER SHALL DIE; the conſequence is obvious, according to the plaineſt rules of Logic, that if it be not forethought felony, he ſhall not die, otherwiſe the act is abſurd. And as to Sir George Mackenzie's obſervation upon theſe words, it is certainly not ſo accurately placed as an obſervation upon that act, becauſe it plainly relates to the act of *Charles* II. and therefore falls to be conſidered, when we come to argue the import of that act.

THE Purſuer's obſervation, by way of anſwer to the 51ſt *Act. Parl.* 3. *James* I. is entirely nought; for if it extend the difference between forethought and *chaud melle* to all tranſgreſſions as well as Manſlaughter, then for certain it eſtabliſhes the diſtinction in the caſe of Manſlaughter; and ſo Sir George Mackenzie likewiſe ſays, in his obſervations on this act, as well as in his Criminals. And as to his further obſervation, That *chaud melle* is by our preſent law puniſhable by death; that ſtill refers to the act of parliament *Charl.* II. and muſt be examined with it.

THE Purſuers have further pled, "That the be-"nefit of the ſanctuary might be competent where "crimes were capital;" which he founds upon the Statutes of *Alexander* II. But this is not worth diſputing; for if the flying to the ſanctuary, joined with repentance

repentance, and ſo forth, rendered the crime not capital, it is all the ſame thing; that is in effect to render the crime not capital only by another form, but ſtill the ſubſtance remains, that according to the law the pain of death was to be inflicted. At the ſame time that Statute concerning reifs, whereby repentance abſolves from the puniſhment, is ſomewhat peculiar, and does not at all contradict the other laws, which make or ſuppoſe *chaud melle* not to be capital; and the laſt part of the Statute, appointing, THAT IF MANSLAYERS FLY TO THE KIRK, THE LAW SHALL BE KEEPED AND OBSERVED TO THEM, eſtabliſhes the point, that if they were not found murderers by forethought, they were to be returned to the ſanctuary, and freed from puniſhment.

THE Purſuers ſay, "That after the Reformation, "when the *jus aſyli* was in effect aboliſhed, then "the diſtinction betwixt forethought felony and "*chaud melle* ceaſed; and that it was never objected, "that malice or premeditate deſign was requiſite to "make the crime capital." And for this they take notice of two caſes, *Currie* againſt *Fraſer*, *July* 1641, and *Bruce* againſt *Marſhal*, *April* 1644. But in the *firſt* place, The Procurators for the Pannel with reaſon ſay, That if that happened, it was an error in judgment; for ſince the diſtinction was eſtabliſhed by the old laws, and that there was no law at that time altering or repealing thoſe old laws, the abolition of Popery, and of the flying to the Kirk in conſequence, was no reaſon for judging contrary to the civil laws that were ſtill ſtanding; and if an eſcape of that kind happened, it muſt be attributed to the over great zeal, and, if we may be allowed to ſay it, a ſort of enthuſiaſtic keeneſs of thoſe times: And we do apprehend, that the act 1649, and the act of *Charles* II. were intended to correct the errors that by too great zeal had then crept in.

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At the ſame time, as to the two caſes cited, they are nothing to the purpoſe; for as to the firſt, which is *Fraſer's*, there was not one circumſtance pled or proved which could make the ſlaughter *chaud melle*: But, on the contrary, it appeared direct premeditate murder, no real provocation, but a quarrel about a ſtaff; a murder committed in revenge, upon the ſlayer's hearing the perſon killed had murdered his brother, which plainly implied a premeditate deſign. What argument this can afford, is ſubmitted. This indeed may be remarked, that the caſe gives ſome notion of the ſpirit of the times; the Preſbytery took evidence whether the murder was accidental or wilful, they found it to be wilful, and noways accidental; their having done ſo, was taken as evidence in Court, and even the wife of the deceaſed was ſworn as a witneſs: Things, it is hoped, not to be drawn into example; only ſo far it ſhews, that even then it was a conſideration by the Preſbytery themſelves, Whether it was a wilful murder or not? Which ſeems to point at an eſtabliſhment of the diſtinction. But, in ſhort, there is not one circumſtance in the whole caſe that could exclude the premeditation or forethought, but all quite on the contrary.

The other caſe of *Marſhal*, in the 1644, is as little to the purpoſe; he was libelled for wilful murder, and he confeſſed it, without pleading any defence, becauſe indeed he had none. He in his confeſſion adjected ſome circumſtances which might have given ſome colour, but indeed very little for a defence: But he offered no proof even of thoſe circumſtances; and his own declaration could be no evidence of them. They were not intrinſic, but extrinſic qualities of the declaration. He had given repeated ſtabs with a knife. Where could be the

queſtion that that was murder? And theſe being all the inſtances the Purſuers bring before the act of *Charles* II. it is plain they prove nothing by them.

As to the act, *Charles* II. it is humbly inſiſted for the Pannel, That it introduces no new law againſt any perſon accuſed of ſlaughter, but aſcertains ſomewhat in their favours, *viz.* "That caſual "Homicide, Homicide in lawful defence, and Homi- "cide committed upon thieves, *&c.* ſhall not be pu- "niſhed by death. *And then further Statutes*, That "even in caſe of Homicides caſual, it ſhall be lei- "ſom to the Criminal Judge, with advice of the "Council, to fine him in his means, *&c.* or to im- "priſon him." This law ſeems introduced to correct ſome abuſes that had been; whereby Homicides falling under ſome of thoſe deſcriptions, either had been puniſhed with death, or at leaſt that it had been made a doubt of, if they might not be ſo puniſhed. What thoſe caſes were, does indeed not appear from the Records, ſo far as the Pannel's Procurators know; but it ſeems ſuch caſes, at leaſt ſuch doubts were. But then the act does not determine what was meant by caſual Homicide, and does by no means ſay, that nothing was to be reckoned caſual Homicide, except that which was merely accidental; but, on the contrary, it leaves caſual Homicide to be explained, according to the conſtruction of former laws, whether our own laws, or the laws of other nations.

2*do*, It is plain from the act, that by caſual Homicide, ſomething is underſtood quite different, at leaſt beyond ſlaughter merely accidental; for the act is concerning the ſeveral degrees of caſual Homicide: And ſo even Homicide in defence, and Homicide committed upon thieves, *&c.* are brought under that general deſcription of caſual Homicide; and theſe laſt

laſt kinds are given as exemplifications of the general deſcription; which ſhews, that caſual Homicide was intended to be oppoſed only to ſlaughter doloſe, committed either by premeditate forethought, or malice preſumed to be taken up from the circumſtances immediately preceeding the act; and therefore, however critical exceptions may be taken to the rule, yet materially there is no ſtrong objection lies to it, becauſe when *caſual* is taken in the extenſive ſignification, as oppoſite to *fraudulent* and *doloſe ſlaughter*, all the ſpecies mentioned in the act do properly enough fall under it, and are degrees of caſual Homicide. And indeed it is worth obſerving, and makes in this caſe for the Pannel, that the rubric cannot be ſaid to have been indigeſted or adjected by mere inadvertency, ſince the ſame rubric is made uſe of in the act 1649, and again repeated in the 1661, ſo many years after.

And this rubric affords another plain argument, That the legiſlative did at leaſt conſider that there might be degrees of caſual Homicide, and conſequently they could not underſtand by that, only merely accidental ſlaughter, ſtrictly ſo called: Since there can be no degrees of that; it is but one, and does not admit of degrees. And therefore this is ſufficient to ſhew, that more was meant than the Purſuers incline to admit; and if more was meant, that can allow of no other conſtruction, than to bring under theſe words what the Lawyers call *culpable Homicide*, ſo as that your Lordſhips and the Jury may judge from circumſtances, whether the ſlaughter is to be reckoned as caſual, or really malicious, from malice prepenſe.

The laſt part of that act of Parliament further enforces that matter, which gives a power not only to fine for the uſe of the neareſt relations, but even to impriſon for caſual homicide. Now, how is it poſ-

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ſible to believe, in conſiſtency with any juſtice, that a man might be impriſoned for a fact intirely innocent, and noways either culpable or criminal? yet ſuch Homicide merely accidental is: And therefore this ſhews to demonſtration that the legiſlator underſtood, that, under the deſcription of caſual homicide, ſuch a fact might come as carried a *culpa* along with it, and was not abſolutely accidental or innocent.

And this being the plain meaning of the law, it muſt remain only to conſider, whether culpable homicide, or more particularly the preſent caſe, does not, in a true and legal ſenſe, fall under the words *caſual homicide*. And we hope we can be under no difficulty to make that good, from what has been already ſaid; *firſt*, that even by the *Jewiſh* doctors and interpreters of the *Moſaick* law, homicide without hatred and foreſight, hath been called *caſual homicide*; the paſſage above cited from the collation of the *Moſaick* and *Roman* law, expreſly ſhews it. *2do*, All that has been ſaid from the texts of the civil law, and lawyers, prove it; ſince they directly call ſlaughter, *ex ſubito impetu*, *ex calore iracundiæ*, *in rixa*, where there was juſt provocation, *caſual*; *caſu magis quam voluntate fit*; *caſui magis quam noxæ imputandum*: And all the reſt of their expreſſions plainly denominating all ſlaughters *caſual* in the large ſenſe, except that which is done *doloſo animo occidendi*. *3tio*, The expreſſions in our own old laws prove the ſame thing; thoſe kind of ſlaughters are called *chaud melle* or *chance medley*, which is caſual: And ſo Skeen ſpeaks, in the very place the purſuers have cited, manſlaughter committed voluntarily, by forethought felony, (or not which ever of the degrees be received) caſually by *chaud melle*. There your Lordſhips ſee *chaud melle* is expreſsly brought under the deſcription of caſual; and ſo that being the caſe, we are under the letter of

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the act Charles II. we are included under the firſt branch of *caſual homicide*.

And as we apprehend this holds in general, ſo it holds more particularly in the Pannel's caſe, where, whatever was deſigned againſt *Bridgeton*, yet, as to my Lord *Strathmore*, the killing was caſual, and therefore falls directly under the words of the ſtatute.

It affords no ſolid argument againſt us, that the act of Parliament bears theſe words, FOR REMOVING OF ALL QUESTION AND DOUBT THAT MAY ARISE HEREAFTER IN CRIMINAL PURSUITS FOR SLAUGHTER. For 1*mo*, Thoſe words muſt ſtill be underſtood with regard to the particulars enacted upon, that it is for removing all doubts as to thoſe particulars; for it can never be pretended, that this or any act of parliament could remove all doubts, even upon unforeſeen caſes, many of which might happen that could not fall under the words of that law: For inſtance, homicide committed in ſuppreſſing a mob, ſtrictly ſpeaking, falls under none of the words; or homicide committed in preventing the eſcape of a priſoner actually impriſoned, and endeavouring his eſcape: And many other caſes may be figured. But 2*do*, According to the interpretation we inſiſt upon, the act of Parliament does remove all queſtions, ſo far as human eyes could foreſee, if the words (*caſual homicide*) be taken in the ſenſe we give them; and on the contrary, it does not remove all queſtions, if culpable homicides, and this very caſe, be not included; for then the law has ſtatuted nothing upon them, either one way or other, but hath only ſtatuted upon murder merely accidental, homicide in defence, and the others therein mentioned. Beſides, that it may be pled without any ſtretch, that a culpable homicide is a ſpecies of homicide in defence; though not preciſely in defence of life, it is in defence againſt a further injury threatened, and expected from the prior injury

injury already given: And on theſe conſiderations, we humbly apprehend, the act of parliament makes nothing againſt the Pannel, but rather favours him, ſince the queſtion is anent a homicide purely caſual as to the perſon that was killed; and which conſideration entirely diſtinguiſhes his caſe from every other caſe that hath been tried ſince the act of Parliament. And it may not be improper to notice, that Sir George Mackenzie ſays, "The word *caſual*, in the ru-"bric of this act, is taken in the lax ſignification." And why not then take it the ſame lax ſignification in the ſtatutory part?

It is now proper to take notice of Sir George Mackenzie obſervations upon the 51. *Act*, *James* I. And in the *firſt* place, If Sir George be ſuppoſed to go as far in his opinion as the Purſuers plead, we muſt beg leave to oppone the law, and ſubmit the interpretation of it to your Lordſhips judgment, as not ſufficiently ſupporting his opinion. 2*do*, Sir George ſays nothing againſt the ſlaughter's being caſual in the preſent caſe, where the blow was intended at one, and another ſtruck by fatality. 3*tio*, His words do not go ſo far as the Purſuers would ſtretch them; for, in his obſervation on the ſaid 51. *Act*, he only ſays in general, *That* chaud melle, *or* homicidum in rixa commiſſum, *is capital by our preſent law:* And ſo it is in many caſes; for inſtance, where the killer is the provoker, where he reiterates ſtrokes in ſuch a manner, as to ſhew a forethought and formed deſign, although not premeditated for a long interval of time before: But Sir George does by no means ſay, that *chaud melle* or *homicidium in rixa commiſſum*, is in every caſe capital; the contrary is moſt certain, as will appear from your Lordſhips judgments afterwards to be noticed.

His obſervation upon the 90th *Act* is noways againſt us; he ſays indeed, "That Murder, though "committed

" committed without forethought felony, is pu-
" niſhable with death:" By which he muſt mean premeditate malice; and that is true; for no doubt malice, where it can be preſumed from the act itſelf, and where the contrary does not appear from circumſtances, is puniſhable by death, without further forethought; but then he ſubjoins an exception, which leaves the matter where it was, *except*, ſays he, *it be caſual*; that is, according to the words of the law: And ſo the queſtion remains, What is is caſual in the ſenſe of that law?

THE Purſuer's uſe an argument, which ſeems to be of no force, " That if manſlaughter was not ca-
" pital, then the Crown could not pardon any ca-
" pital ſlaughter; becauſe by our law the Crown
" could not pardon murder." We might eaſily admit the whole, without hurting our argument; for if it be true that the Crown could not pardon murder, then it is likewiſe true that he could not pardon any ſlaughter that was capital; becauſe no ſlaughter was capital but murder: Nevertheleſs the poſition, That the Crown could not pardon murder, is not ſupported by practice, and we doubt, not by our law; becauſe in ſeveral caſes, even of murder, the very thing ſtatuted is, THAT THE PERSON OF THE CRIMINAL SHALL BE IN THE KING'S WILL; conſequently the King can pardon, as well as order to be put to death.

THE Purſuers, in their Information, next go on to mention a great many caſes that have been judged by the Court ſince the act 1661; and the firſt mentioned is that of William Douglas, which appears in the records, and is noticed by Sir George Mackenzie, and is indeed noticed by him as a foundation for ſome things, wherein he ſeems to go too far. But this caſe will never deſerve any regard; it has always been

been looked upon as a hard one, and we are afraid a reproach on the juſtice of the nation. But at the ſame time the fault did not ly on the Court; it was truly the jury; for the trial went in general upon the art and part; and there appears no particular pleadings to this purpoſe on record in that caſe: So that what Sir George ſays of it muſt be from mere memory of things not thought fit to be recorded.

THE next caſe mentioned is that of Nicolſon, in the 1673; which can never make for the Purſuers, becauſe there your Lordſhips ſuſtained both the libel and the defence, though indeed the defence was not proved: And therefore, if the Purſuers ſay, that the defence was upon *chaud melle*, or culpable Homicide; the caſe is with us, becauſe your Lordſhips ſuſtained the defence. And although in reality the crime was proved to be willful murder, and the defence not proved; yet ſo far it is on the Pannel's ſide, that the Advocate inſiſted Nicolſon was *verſans in re illicita*, by carrying a gun, which he acknowledged uſed to go off on half-bend; yet your Lordſhips ſuſtained the defence, "That the gun went off in a ſtruggle:" And if an argument from a Lawyer's pleading be good for any thing, Sir George Mackenzie pled for the Pannel, in that caſe, ſome of the very ſame principles we now inſiſt on, "That there was no preju-"dice againſt the perſon killed, and that the gun "went off in a ſtruggle." But indeed, the caſe is nought in the argument, and it ſeems ſtrange why it is cited: It is true the man was ſaid to be drunk, and there was not a previous quarrel; but then there was no provocation, no *juſta cauſa iracundiæ*, and no *iracundia* at all; but the gun was twice deliberately ſnapp'd, and the third time the man was killed.

THE third caſe mentioned, is Murray *contra* Gray; yet leſs to the purpoſe than any other: For there, the giving the wound was libelled ſo far premeditate, that

that the ſlayer followed the perſon out of the houſe where he was, and killed him without any provocation: And not one ſingle fact was pled in defence, but a ſtrange demand made, that the Lords ſhould make an inquiſition, in order to diſcover who was the firſt aggreſſor; but it was not once pled that the defunct was the aggreſſor or provoker. What can be the meaning of citing ſuch caſes?

THE next caſe cited is that of *Aird*, in the 1693; which indeed is ſomething more to the purpoſe, but yet does not anſwer the Purſuers intention: For the Lords did not there find, that every homicide was capital, except what was merely accidental; they indeed ſuſtained the libel, and repelled the defences, which were mainly founded upon provocation by ill words from a woman, and her throwing a chamber-pot at the Pannel's face, who was a Soldier: which the Lords did not find ſufficient to exculpate from the libel, which bore reiterate ſtrokes to have been given the woman in her own door, (which by the bye was hameſucken) ſhe thrown over the ſtairs, and purſued by the then pannel. That caſe was very ſingular: Firſt, an attack upon a woman by a ſoldier, who ought to have contemned inſults from the female ſex, at leaſt, not returned them with any blows: No injury of that kind from a woman, can juſtify blows given, much leſs reiterated blows, and deliberately trampling to death, throwing her over her ſtair, and ſtill continuing to purſue her: There, the preſum'd difference of ſtrength, and difference of the ſex, made ſuch an attack a barbarous murder; juſt as an invaſion by a much ſtronger man againſt a weaker, or by a man againſt a woman, although not with a mortal weapon, would make a blow with a mortal weapon, given by ſuch a woman or weaker perſon, come within the deſcription of ſelf-defence: Which is a caſe that lawyers ſtate, although the ſame thing

would not be good, if they were of equal ſtrength, or that the invaſion was by the woman, or perſon of weaker ſtrength.

ANOTHER caſe mentioned, is that of Carmichael in the 1694. But ſure your Lordſhips muſt be weary of ſo many caſes, ſo little to the purpoſe: For neither there, is there one circumſtance pled upon to exclude forethought, or to ſhow that the thing was cauſual in any ſenſe; but ſome trifling objections againſt the form of the libel: Only indeed, Drunkenneſs, by it ſelf, was founded on, which your Lordſhips did not ſuſtain. And who can doubt it muſt be ſo?

THE ſeventh caſe mentioned by the purſuers, is that of George Cuming in the 1695. And upon looking into the caſe, it muſt be owned, that it ſeems a very narrow hard caſe: But then, the whole burden of the Purſuers pleading turns upon this, That ſuppoſing there was a *rixa*, and that the thing happened upon a ſudden quarrel; yet Cuming himſelf was the firſt provoker, and the *auctor rixæ*, and therefore could not plead the benefit even of ſelf-defence; which indeed brings the caſe within what all lawyers agree on. And had it not been for that circumſtance, 'tis impoſſible the deciſion could have gone as it went: For in effect, the King's Advocate admitted the defence, barring that circumſtance; but inſiſted upon that as what governed the caſe. Yet ſtill the deciſion is narrow.

THE Purſuers alſo mention the caſe of Burnet of Carlops, *anno* 1711. But it is plainly againſt them; and it being to be noticed for the Pannel, ſhall not be dwelt upon here.

THE next caſe is that of Hamilton of Green, *anno* 1716; which does not at all meet: For there a plain murder was libelled, that the pannel firſt made ſeveral puſhes with his ſword and ſcabbard upon it;

and

and not content with that, drew the ſword, and gave the defunct the mortal wound. And no provocation was pled upon, on the part of the pannel, except what was verbal only. And the only real injury, by ſtriking with the ſword and ſcabbard, was admitted to have been given by the pannel. And though it was there pled, that the defunct himſelf ruſhed upon the ſword, that was contrary to the libel: And if the fact had come ſo out, the libel would not have been proved. And therefore, that caſe does not at all meet; for there were not ſufficient circumſtances to exclude the dole, or ſo much as to make a *homicidium culpoſum.*

ANOTHER caſe they mention, is that of Thomas Roſs and Jeffrey Roberts, 20th July 1716; which makes againſt the Purſuers, as it is ſet forth by themſelves: For there the Lords did ſuſtain the defence of provocation by words, receiving a blow on the face, being pull'd down to the ground, and beat with a great ſtick or car-rung, relevant to reſtrict the libel to an arbitrary puniſhment. And though the words "To the imminent danger of his life," are inſert, as they were pled in the defence; yet that was not a fact, but a conſequence inferr'd from the being ſtruck with a ſtick. And if the *periculum vitæ* had been the foundation on which the interlocutor went, then it muſt have been unjuſt; becauſe no man alive ever doubted, that a man in ſelf-defence, might lawfully kill, without being ſubject to an arbitrary puniſhment whatſoever: But the caſe was, that your Lordſhips found the provocation and real injuries reduced the fact to a *homicidum culpoſum.* You indeed ſuſtained the reply, That the defunct was held by Jeffrey at the time of receiving the wound, becauſe that excluded the defence of the Pannel's being upon the ground when he gave the wound, and made the fact amount to murder; becauſe it never was doubted, but

if

if one ſtab another, eſpecially with a knife, which is ſtabbing in the moſt barbarous ſenſe, when that other is held, and ſo put out of the ſtate of doing further injury, that is murder by the law of all nations.

The Purſuers likewiſe mention a caſe of Davidſon, without noticing either date or circumſtances; and therefore the Pannel muſt conclude there was no defence proponed, excluſive of the dole or forethought.

The caſe of Lindſay and Brock, the Greenock Taylors, is very far from putting the caſe out of doubt, or indeed touching it at all. The caſe was, that the defunct was enticed out of his houſe, and was attack'd by two at the ſame time; and when he and they were on the ground, one of them, which came out to be Lindſay, ſtabbed him in the throat with a pen-knife. There your Lordſhips did not ſuſtain the crime as capital againſt them both, even upon the art and part, but only againſt the one who ſhould appear to have given the ſtab, and that came out to be Lindſay: But then indeed you found, not without difference in opinions, that nevertheleſs he had the benefit of the indemnity, upon this foundation, that though the *homicidium* was *doloſum*, becauſe of the circumſtances, yet it was not from malice premeditate: And the majority were of opinion, that the indemnity excluded nothing but premeditate murder, and did not touch any caſe done *in rixa*, notwithſtanding the perſon guilty might be the *auctor rixæ*. This does by no means determine any queſtion betwixt a *doloſum* and *culpoſum homicidium*; for that fact was inſiſted to be *doloſum*, and indeed ſo found. 'Tis true, it proves that an indemnity may reach even a *homicidium doloſum*, where the dole aroſe immediately, and not *ex intervallo*; but that ſays nothing to this queſtion, nor is it proper to enter upon the argument about the indemnity, now that the judgment is given.

The caſe of *Mathews* the Soldier, the Purſuers admit, was of the ſame nature, and ſo needs no other anſwer;

anſwer; only, That, in that caſe, there were no circumſtances ſufficient to exclude the dole, or make it only a culpable Homicide.

THESE are all the caſes the Purſuers have mentioned, and, if numbers would do, no doubt there is enough; but your Lordſhips are to judge how far to the purpoſe: And one thing is remarkable with regard to them all, That not one of them touches the caſe in hand, in ſo far as concerns the ſlaughter's being caſual as to my Lord *Strathmore*, the invaſion being intended againſt *Bridgeton*.

BUT now the Counſel for the Pannel beg leave to take notice of ſeveral deciſions, even ſince 1661, which directly eſtabliſh the point pled for the Pannel, and the firſt is Maſon's caſe in the 1674, to be ſeen in the Record; and alſo obſerved by Sir George Mackenzie. Maſon was accuſed of killing Ralſton. The defences were three, *firſt*, That Ralſton had followed Maſon from houſe to houſe, at laſt, put violent hands upon him; whereby Maſon was forced to throw him off, and that he fell againſt a ſtool. 2*do*, That the wound was not mortal, but Ralſton died *ex malo regimine*. 3*tio*, That the Homicide was merely caſual, and in ſelf-defence, Ralſton being the aggreſſor. The Lords ſuſtained the libel only relevant to infer the *pœnam extraordinariam*, and ſeparately ſuſtained the other defences to aſſoilzie *in totum*, and remitted all to the knowledge of the inqueſt. Here your Lordſhips ſee, the killing only ſuſtained *ad pœnam extraordinariam*, without regard to the three defences, of caſual Homicide, ſelf-defence, and dying *ex malo regimine*; for they are all ſuſtained ſeparately to aſſoilzie, even from the *pœna extraordinaria*: Here then was a culpable Homicide, ſuſtained only *ad pœnam extraordinariam*, though neither merely caſual, nor in ſelf-defence; and ſo there can be no judgment more direct upon the point now pled.

AND

And here the Pannel muſt notice, once for all, That it makes nothing to this queſtion, That in that, and other like caſes to be mentioned, a mortal weapon was not uſed; for it is one queſtion, What is ſufficient to make a Homicide only culpable? and quite another, Whether, in our law, there is ſuch a thing as culpable Homicide, though neither merely caſual, nor in ſelf-defence? That of the uſing a deadly weapon enters into the argument, Whether a Homicide is doloſe or culpable only? But it makes nothing to the other queſtion, ſince Homicide may not be merely caſual, although no mortal weapon is uſed, as appears both from this deciſion, and the caſe of Bain, cited for the Purſuers.

Another caſe, is that of Grierſon and others, 12th *March* 1684; where the pannels being accuſed of Murder, for killing the defunct in a ſcuffle; the defence proponed was, That the defunct was the firſt aggreſſor, and did invade the Pannels, or one or other of them; and that William Grierſon, or one or other of them, being ſtanding before the fire, the defunct threw the ſaid William, or one or other of them, in the fire, and fell upon himſelf; and then, after the ſcuffle was over, the defunct did riſe, walked up and down, diſcourſed, and of new again beat the ſaid William Grierſon, and threatened to kill him if he would not be gone; that the defunct went in good health to the door thereafter. Theſe the Lords ſuſtained relevant to liberate from the ordinary pain of death. Here is another deciſion in point; the crime was not found merely caſual, or the Court muſt have aſſoilzied; at leaſt, could only have impriſoned, and could have inflicted no other arbitrary puniſhment. But that was not the caſe, it was found culpable, and not merely caſual; and therefore the puniſhment reſtricted. Sure then, it is not true in law, that all Homicides are capital, unleſs they be merely caſual.

A third caſe, is that of *Maxwell* and others, 7th *November* 1690, purſued for the murder of *John Ruſſel*, where the Court ſuſtained this defence, That there was a previous combination to make a convocation, in order to debar and keep out Mr *Walter Macgill*, Miniſter of from entring into his Church that *Sunday*, in conſequence of which, a convocation happened; and when they were required to diſperſe, they took the keys from the Beadle, and beat the Notar, and the Miniſter's wife, and others, before the ſlaughter was committed, relevant to reſtrict the ſlaughter to an arbitrary pain. And found yet further, That if any actual attempt was made, by throwing great ſtones at the Miniſter, before committing the ſlaughter, that that was ſufficient to liberate from the ſlaughter *ſimpliciter*. Sure the firſt part of the defence, implied neither accidental Homicide, nor ſelf-defence, but a provocation by real injuries; yet the Court juſtly ſuſtained it to reſtrict.

On the 6th *November* that ſame year, another Judgment was given, very oppoſite to the Purſuers pleadings, in the caſe of Captain *Price* and others, who were proſecuted for ſhooting one *John Reid*, a tradeſman of *Glaſgow*, and ſerjeant at that time of a guard kept in that Town. The caſe was, that Captain *Price*, and others with him, had made ſome diſturbance in the houſe where they lodged, and committed ſome rudeneſs to the landlady and her maid, which occaſioned the guard to be called; and when the guard came, commanded by *Reid*, and entered the room where *Price* was, he and his company reſiſted the guard, and one of them ſhot *Reid* dead. The defence proponed was, "That before any guard "came, a mob had begun to riſe, and had gathered "at the door where the officers were, who had ſhut "the door upon themſelves, and cried to ſhoot the "dogs,

" dogs, and words to that purpoſe : That when the " guard came, they did not know it was the guard, " but reſiſted and fired, from apprehenſion that it " was the mob, and ſo killed Reid the Commander " of the guard." The Lords " ſuſtained that de- " fence relevant to reſtrict the libel." And in that Judgment, beſide the eſtabliſhment of the general principle, this may be obſerved, That Reid was killed by miſtake, as one of the mob, and there neither was nor could be any provocation from him ; neither was it pled, That the mob had given any real injury, but only were gathered in a tumultuous way, and uttering injurious words : Yet the Court juſtly reſtricted the libel ; though it is plain the ſlaughter was not accidental, except in ſo far as the commander of the guard was killed in place of a mobber. Neither was it ſelf-defence, becauſe the pannels had no right to reſiſt the guard, only there was an injury by the convocation, and an apprehenſion given of greater injuries, though that apprehenſion was not ſolidly founded.

THE caſe of Captain Wallace firing on the boys from the *Abbay*, may likewiſe be noticed ; but being a well known caſe, needs not be at length recited.

A fourth caſe is that of Enſign Hardie, 6th June 1701 : He was accuſed of murder, by giving repeated thruſts with a drawn ſword, to one Smith, who at the time had no arms, whereof Smith inſtantly died; and that he afterwards boaſted of his crime and cruelty, telling other gentlemen, that he had bowed his ſword upon the perſon of a fellow at *Scarbridge*. The defence proponed, and ſuſtained, was, " That the de- " funct was the firſt aggreſſor, and did take hold of " the Pannel's horſe-bridle ; and when he was hold- " ing the horſe by the bridle, did give the Pannel a " ſtroke over the face with a rung or tree, and " wounded him to the effuſion of his blood ; and

" that

" that the defunct beat the pannel from his horſe." Theſe were *found relevant to reſtrict the libel to an arbitrary puniſhment.* And then the reply was ſuſtained relevant to elide it, " That the pannel beat the de- " funct on the face with a twiſted rod, before he " ſtruck the pannel." Here again the point is fixed; no caſual Homicide, nor Homicide in ſelf-defence: And ſo your Lordſhips had found by a former Interlocutor, wherein you repelled the defence, when proponed as ſelf-defence, but yet reſtricted the puniſhment, becauſe the Homicide was culpable.

A fifth caſe, yet ſtronger, is, that of the 1ſt of *March* 1710: Peter Maclean, who was accuſed of the murder of James Ewing, by ſhooting him dead with a fowling-piece, when Ewing had no arms in his hand. The defence ſuſtained to reſtrict the libel to an arbitrary puniſhment was, " That the defunct " quarrelled the pannel, under the name of raſcal, " how he durſt carry a fowling-piece, and that if the " Prince had his own, he durſt not ſo do; and adding " theſe words, That her Majeſty was but a whore, " and thereupon aſſaulted the pannel for taking his " carabin from him." Theſe are the words of the Interlocutor; and it is ſo plain, that no obſervation needs be made upon it.

ANOTHER caſe is, that of *Bathgate*, 23d *January* 1710: He was accuſed of murdering Andrew Braidwood, by throwing him down to the ground, and giving him ſeveral ſtrokes and bruiſes, whereof he died. Your Lordſhips " found the libel only relevant to " infer an arbitrary puniſhment;" yet the fact was not intirely caſual, nor pled to be ſo: And you ſuſtain'd the defence, " That the throwing down li- " belled, was only a wreſtling, out of no malice, " and that previous thereto the defunct was valetu- " dinary, and in the habit of ſpitting blood, rele- " vant to elide the libel *in totum.*"

THE caſe of *Govan*, 3d *March* 1710, is not ſo plain as the others above mentioned; but yet it does aſſiſt in the queſtion: For there your Lordſhips ſuſtained opprobrious language and invaſion, by beating in a ſcuffle, though without mortal weapons, relevant to reſtrict the puniſhment of killing with a ſword, even ſuppoſe the killing ſhould be proved to have been without the door of the houſe, when the laſt beating was only pretended to have been within the houſe; and ſo the beating muſt have been over before giving the wound, and the pannel employed *in proſequendo*, by way of retortion of the injury that had been given.

ANOTHER unanſwerable caſe is that of *Carlops*, *January* 8th 1711; the circumſtances of which are ſo well known, that it is in vain to repeat them; ſure it was neither accidental Homicide, nor Homicide in defence: But the Lords ſuſtained the defence, That the beating was *per plures commiſſum*, in conjunction with any two of the following defences, *viz.* "That "any beating committed by them was in a tuilzie or "*rixa*, in which they mixed themſelves, to relieve "a youth in the defunct's grips, or in a ſtruggle with "him. Or, *ſeparatim*, That they had ſwords about "them, and only made uſe of ſtaves or batons, re-"levant to reſtrict the libel to an arbitrary puniſh-"ment."

THERE is another caſe likewiſe worth noticing, 18th *December* 1712; the caſe of Serjeant Davies, who was accuſed of the murder of Mr Robert Park—where your Lordſhips "found the pannel his being "alone, time and place libelled, and a ſcuffle then "happening betwixt the defunct, with two or three "more in his company and the pannel, and after "a beating with ſtaves betwixt the ſaid men and the "pannel, the ſaid pannel his retiring and calling for "the guard, and being mutilate in the hand before

"he

" he gave the ſaid mortal wound, relevant to reſtrict " the libel to an arbitrary puniſhment.

ANOTHER very late caſe is that of Jaſper Reyſanno, 14th December 1724, where the pannel being accuſed of killing Robert Lamb, by throwing him over the ſtairs, without cauſe or provocation, whereby he was brained; your Lordſhips ſuſtained it only " relevant to infer an arbitrary puniſhment:" Yet ſure it was not accidental, far leſs in defence. All which caſes plainly eſtabliſh the point, that even ſince the act of parliament 1661, the conſtant practice hath been to find culpable homicides only relevant to infer arbitrary puniſhment; and that there are homicides not puniſhable with death, though neither merely accidental nor in ſelf-defence.

THERE is alſo a caſe which deſerves to be noticed, as to that point, of a third party's being killed when interpoſing betwixt other two in a ſcuffle: Which is the caſe of John Graham, 1ſt December 1712, where Graham was accuſed of murdering David Cochran. But your Lordſhips ſuſtained the defence, " That while he was attacked by Blyth with " a drawn durk, the pannel was in his own defence " with a drawn bayonet; and that in the mean time, " the defunct interpoſing as a redder betwixt them, " did caſually receive the wound libelled, relevant " to reſtrict the libel to an arbitrary puniſhment."

THIS Information having drawn to ſo great a length, we are unwilling to trouble your Lordſhips with further references to the laws of other countries, particularly to the law of England; although we apprehend the law there does not differ ſubſtantially from our law in this particular, except it be in theſe; *1ſt*, That manſlaughter is in effect not puniſhable at all in England, otherwiſe than by a kind of eluſory puniſhment; *2do*, That in no caſe *dolus* is preſumed only from the giving the wound, except upon the particular

lar ſtatute of ſtabbing: Whereas indeed it is in ſeveral caſes otherwiſe with us; culpable homicide is puniſhable arbitrarily, and no doubt in many caſes, where contrary circumſtances do not appear, the giving the wound preſumes dole, and even by the ſtatute of ſtabbing, the killer hath the benefit of his clergy, if the perſon killed give the firſt blow or real provocation, and that although the provocation did not immediately precede the act of killing, if it happened at any time of the quarrel.

THAT by the ancient law of England, ſlaying a man did not infer death, yea perhaps not what we call murder itſelf, ſeems plain from *Aſſiſa Henrici Regis apud Northampton*, publiſhed by Selden, in his *Janus Anglorum* pag. 120. of the laſt edition; by which it appears, that even murder itſelf and robbery, was puniſhable only by mutilation, ſuch as cutting off the hand or foot: And all their law-books, as well as the daily practice, eſtabliſhes the diſtinction betwixt forethought felony and ſlaying on ſuddenty; yea of old, even a murderer by malice prepenſe ſeems to have had the benefit of the clergy, and that benefit only taken away from ſuch murderers by the firſt act, 23d Henry VIII. and their books of Reports are full of the examples that ſlaughter on ſuddenty is not murder or capital. In Cook's Reports it is ſtated, that ſeveral men playing at bowls, two of them quarrelled, and a third, in revenge of his friend, ſtruck the other with a bowl, of which wound he died: This was held manſlaughter; for it was done upon a ſudden emotion, in revenge of his friend.

THERE likewiſe, two boys combating together, one of them was ſcratched in the face, and his nose run a great quantity of blood; he went three quarters of a mile off to his father; who ſeeing him all bloody, took in his hand a cudgel, and went three quarters of a mile to the place where the other boy was, and ſtruck him upon the head, of which the boy died.

This

This was held but Manſlaughter; for the ire and paſſion of the father was continued; and there was no time determined in the law that it was ſo ſettled, that it ſhall be adjudged malice prepenſe in law.

The caſe of Mawbridge, ſet down at length by Lord Chief Juſtice Keyling, makes ſtrongly for us; and we beg leave to refer to the whole treatiſe there ſet down, and particularly to the firſt ground of provocation, which he declares to be ſufficient ſo as to alleviate the act of killing, and to reduce it to a bare homicide: He ſays, "If one man, upon angry words, "ſhall make an aſſault upon another, either by pul-"ling him by the noſe, or fillipping upon the forehead, "and he that is ſo aſſaulted ſhall draw his ſword, and "immediately run the other thorow that is but "manſlaughter; for the peace is broken by the per-"ſon killed, and with an indignity to him that recei-"ved the aſſault: Beſides, he that was ſo affronted "might reaſonably apprehend, that he that treated "him in that manner might have ſome further de-"ſign upon him." Your Lordſhips ſee how cloſe this is to the caſe: The inſult and indignity done by *Bridgeton* was vaſtly ſtronger than any thing here mentioned: and having received ſuch an affront, he had reaſon to expect worſe; more eſpecially when, as we offered to prove, *Bridgeton* was endeavouring to pull out my Lord *Strathmore*'s ſword.

We muſt likewiſe humbly refer to ſeveral caſes ſet down by Serjeant Hawkins, in his Pleas of the Crown, which fully agree with what we now plead; and particularly take notice of what he ſays, pag. 84. "If a "third perſon happen accidentally happen to be kil-"led by one engaged in a combat with another, "upon a ſudden quarrel, it ſeems that he who kills "him is guilty of manſlaughter only." And it would ſeem that there is even a difference made, betwixt killing a perſon that endeavours to interpoſe,

if

if he tell that he comes for that purpoſe, and killing one who accidentally is interpoſed betwixt the two contending parties, which was my Lord *Strathmore*'s caſe: The killing him who interpoſes to ſeparate, if he give notice what he is doing, is reckoned worſe than the killing the other. And this obſervation ſhews that the preſent caſe is ſtronger than the above cited caſe of Graham, where your Lordſhips reſtricted it to an arbitrary puniſhment. And what that author obſerves, confirms a diſtinction we have made, betwixt a man quarrelling with another, and killing a third party, where it is proved the killer had a felonious intention to murder the other, and the caſe where that does not appear; for however, in the firſt caſe, he might be guilty of the murder of the third party, yet if a deſign to murder the perſon he quarrelled with is not proved, then he can never ſuffer capitally for killing the third party: And we have already endeavoured to prove, that that muſt be the caſe as to *Bridgeton*, where he gave the provocation, and no act followed againſt him ſufficient in law to eſtabliſh a deſign of murdering him.

The Purſuers have cited the ſame books, and Mawbridge's caſe, as for them; but that we ſubmit. The particular caſes of Holloway, and Williams the Welſhman, ſpoke of by Keyling, are not at all to the purpoſe: The Welſhman's caſe was no judgment; but neither in that nor in Holloway's was there any real perſonal injury, on which a great ſtreſs is laid in all theſe queſtions.

The Purſuers mention another caſe ſtated, but never adjudged: A perſon ſhooting at fowls with an intent to ſteal them, accidentally kills a man; that will be murder. This perhaps may be juſtly doubted: Sure it would be too ſevere. But ſuppoſing it were ſo, 'tis of no importance: Stealing, even of fowls, by the law of England, is felony of malice prepenſe;

prepenſe: And where a man attempting to commit one felony, does another, there is little doubt but in ſtrict law he is guilty of the felony committed. But what is that to the caſe of a provocation by a real injury?

THE Purſuers have quoted the authority of Voet, and a deciſion obſerved by him from Sande, to prove, that where one man was intended to be killed, and another ſlain, the crime is capital: In which no doubt, Voet differs from many as learned lawyers, who are of the other ſide. But his opinion, and that of Sande, is obviated by what is already ſaid: It is only in the caſe of no provocation or real injury on the part of him who was deſigned to be killed. And 2*do*, 'Tis always taken for granted, by Voet, and all who are of that opinion, that the deſign of mudering the perſon intended to be invaded, do appear and is proved: But we have already ſhewn, that cannot be ſaid in the preſent caſe.

THE Purſuers pretended, "That there was a circumſtance in the libel which implied malice againſt "the Earl of *Strathmore*, viz. That the thruſt given "was followed by a ſecond puſh." But as there is nothing in this fact, it may be the ſubject of imagination, but can never be the ſubject of proof, unleſs it were pretended, as it is not, that the Pannel drew back or out his ſword, and made a ſecond thruſt; which will appear not to be true, from the nature of the wound; and the thruſt will be found to have been ſo momentary, that it was impoſſible. 2*do*, If any thing like that happened, it will appear, that there was no more in it, but the Pannel's ſtaggering, or moving the ſword by his weight leaning upon it. 3*tio*, There is no relevancy in it at all; the fact being, That the Pannel puſhed as at *Bridgeton*: And no circumſtance will make it appear, that he knew he had touched

touched the Earl of *Strathmore* till ſometime after the fatality was perfected.

THE Purſuers further pretended, "That as they "had libelled malice, they would prove it from other "antecedent facts that had happened ſome time be- "fore, whereby it would appear, that there was en- "mity betwixt the defunct and the Pannel."

IT is anſwered for the Pannel, 1*mo*, That no ſuch facts being libelled, nor, to this minute, condeſcended upon, either in the debate or information, they can by no means enter into the proof, otherwiſe the higheſt injuſtice would be done to the Pannel in this and every ſuch caſe: For if the pretended facts, inferring malice, had been libelled, then it would have been competent to the Pannel to have elided the ſame by a proper proof, to ſhew that they inferred no malice on his part; he might have proved diſſimulation or reconciliation, and would have been prepared for that purpoſe. But where ſuch facts are concealed, and may have happened at an unknown diſtance of time, 'tis impoſſible the Pannel can be prepared with proper evidences. And though it is ſufficient, in an Indictment, to libel malice in general, in order to make a relevancy; yet then it is always underſtood that the purſuer intends no more than the preſumed malice ariſing from the fact libelled: Neither can ſuch proof come in under the head of art and part, becauſe that can only have regard to ſuch facts as happen at the time of committing the action complained of, and ſuch as import a ſhare in the action; but cannot reach to pretended qualifications of malice that happened the Lord knows when,

IN the next place, the Pannel offers to exclude all pretence of former enmity, by proving, that, for ſome time before, they had met from time to time occaſionally, without any marks of enmity, but all the ſeeming requiſites of friendſhip and civility interveening; and

and particularly, that that very day they had dined together, afterwards drunk together for a conſiderable time, and viſited together, in the Lady Auchterhouſe's, a common relation, with all appearances of friendſhip; and that the deceaſt Earl had kindly invited the Pannel and his family to come and viſit him and his, and made a challenge of kindneſs of it, that he was too great a ſtranger. In the caſe of enmity, the divine Law itſelf determines, when hatred is to be preſumed, and when not: "Whoſo "killeth his neighbour ignorantly, whom he hated "not in time paſt; in the Hebrew, from yeſterday, "the third day;" or as in the Latin tranſlation, *qui heri & nudius tertius nullum odium contra eum habuiſſe comprobatur.* So that the very friendſhip that paſſed that day on which the unhappy accident happened, excludes all pretence of former enmity, ſuppoſe there had been any ſeeming differences, of which the Pannel is not conſcious, far leſs of malice, or any capital enmity that ever was.

Upon the whole, though this fatal and melancholy accident, which gives occaſion to the trial, does and muſt ly heavy on the mind of the Pannel, and produce the ſtrongeſt ſorrow and regrete in all that had the honour to know the deceaſt Earl; yet the puniſhing the Pannel capitally for an offence which happened *caſu magis quam voluntate*, would be a very rigorous extenſion of the law. It is plain, from what is above ſaid, that culpable homicide, both by our law and practice, is puniſhable only arbitrarily, and comes under the general deſcription of caſual homicide in the act 1661. No caſe can be more pitiful or favourable than this, where the death happened to a perſon nowiſe intended to be hurt: And therefore 'tis hoped your Lordſhips will ſuſtain the defence pled, relevant to reſtrict the libel to an arbitrary puniſhment.

Ro. Dundas.

A BSTRACT of ſome ACTS of PARLIAMENT, in the very words of the ſtatutes themſelves,

JAMES I. Parl. 3. Act 51. intitled, OF FORETHOUGHT FELONY AND CHAUD MELLA; ſtatutes, " That as ſoon as any complaint is made to Juſtices, Sheriffs, Baillies, &c. they ſhall enquire diligently *(i. e.)* without onie favour, gif the deed was done upon forethought felony, or throw ſudden *chaud mella*: And gif it be found forethought felony——the life and goods of the treſpaſſer to be in the King's will:———And gif the treſpaſs be done of ſudden *chaud mella* the party ſkaith'd ſhall follow, and the party tranſgreſſor defend, after the courſe of the old laws of the realm.

James I. Parl. 6. Act. 95. intitled, THE MANSLAYER SULD BE PURSUED UNTILL HE BE PUT FURTH OF THE REALM, OR BROUGHT AGAIN TO THE PLACE OF THE SLAUCHTER; (the act appointing the method of purſuing manſlayers) ſtatutes, that quhairever he happenis to be takin, that Schireffe, Stuart, or Bailie of the Regality, ſall ſend him to the Schireffe of the nixt Schireffdom, the quhilk ſall receive him, and ſend him to the nixt Schireffe, and ſwa foorth from Schireffe to Schireffe, quhill he be put to the Schireffe of the Schire where the deede was done, and there ſall the law be miniſtred to the party: and gif it be forethought felony, he ſall die therefore."

James I. Parl. 6. Act. 95. intitled, OF INQUISITION OF FORETHOUGHT FELONY TO BE TAKEN BY AN ASSIZE; it ſtatutes, " That the officiars,

" ars (*i. e.* the Judges ordinary) ſhall give them " the knowledge of an aſſize, whether it be fore- " thought felony, or ſuddenly done: And gif it " be ſuddenly done, demain them as the law treats " of before: —— And gif it be forethought fe- " lony, —— demain them as Law will.

James III. Parl. 5. Act 35. intitled, OF SLAUCHTER, OF FORETHOUGHT FELONY, OF SUDDANTIE, AND FLYING TO GIRTH. *Item*, " Becauſe of " the eſchewing of great Slauchter quhich has " been right commoun amongſt the King's lieges, " nowe of late, baith of forethought felony, and of " ſuddantie: And becauſe monie perſons com- " mit ſlauchter upon forethought felony, in truſte " they ſall be defended throw the immunitie " of the Halie Kirk and Girth, and paſſis and " remainis in Sanctuaries; it is thought expedient " in this preſent Parliament, for the ſtanching " of the ſaid Slauchters in time coming, quhair- " ever Slauchter is committed on forethought " felony; and the committer of the ſaid Slauch- " ter paſſis and puttis him in Girth, for the ſaf- " tie of his perſon. The Schireffe ſall come to " the ordinar, in places quhair he lies under " his juriſdiction, and in places exempt, to " the Lords Maiſters of the Girth, and let them " wit, that ſick a man has committed ſick a crime, " on forethought felony, *tanquam inſidiator et* " *per induſtriam*, for quhilk the law grants not, nor " leaves not ſic perſons to joyis the immunities of " the kirk. And the Schireffe ſall require the Ordi- " nar to let a knowledge be taken be an aſſize on fif- " teen days, quhidder it be forethought felony, or " not: And if it be founden forethought felony, " to be puniſhed after the King's laws: And if " it be founden ſuddantie, to be reſtorid again " to the freedome and immunity of Halie Kirk " and Girth.

James

James IV. Parl. 3. Act. 28. intitled, ANENT MANSLAYERS TAKEN OR FUGITIVE; ſtatutes, "That where any happens to be ſlain within the "realm, the manſlayer ſhall be purſued (in a cer- "tain manner) and wherever he happens to be "overtane, that the Schireffe ſall incontinent "ſend him to the nixt Schireffe, and ſo furth, quhill "he be put to the Schireffe of the Schire quhair "the deed was done; and there ſall juſtice be in- "continent done. And gif it be forethought fe- "lony, to die therefore.

James V. Parl. 4. Act 23. intitled, THE MAISTERS OF THE GIRTH SULD MAKE DEPUTES, QUHA SULD DELIVER MALEFACTOURES, THAT MAY NOT BRUIK THE PRIVILEDGE THEREOF; ſtatutes, "That they ſhould be holden in all time "comeing, to deliver all committers of Slauchter "upon forethought felony, that flies to Girth, "and others treſpaſſers that breaks the ſame, and "may not bruik the priviledge thereof, conform "to the common law and the act of Parliament "made thereupon of before, to the King's of- "ficiars, aſkand and deſireand them to underly the "law.

Follows the intire Act of Charles II. Parl. 1. *chap.* 22. *intitled,* CONCERNING THE SEVERAL DEGREES OF CASUAL HOMICIDE.

"OUR Sovereign Lord, with advice and conſent "of the eſtates of this preſent Parliament, "for removing of all queſtion and doubt that may "ariſe hereafter in criminal purſuits for ſlaughter; "STATUTES and ORDAINS, that the caſes of ho- micide,

" micide after following, *viz.* caſual homicide, ho-
" micide in lawful defence, and homicide committed
" upon thieves and robbers breaking houſes in the
" night; or in caſe of homicide the time of maſter-
" ful depredation, or in the purſuit of denounced or
" declared rebels for capital crimes, or of ſuch who
" aſſiſt and defend the rebels and maſterful depreda-
" tors by arms, and by force oppoſe the purſuit and
" apprehending of them, which ſhall happen to fall
" out in time coming, nor any of them, ſhall not
" be puniſhed by death; and that notwithſtand-
" ing of any laws or acts of parliament, or any
" practic made heretofore, or obſerved in pu-
" niſhing of ſlaughter: But that the manſlayer,
" in any of the caſes aforeſaid, be aſſoilzied from
" any criminal purſuit, purſued againſt him for
" his life, for the ſaid ſlaughter, before any judge
" criminal within this kingdom. Providing always,
" That in the caſe of homicide caſual, and of homi-
" cide in defence, notwithſtanding that the ſlayer is
" by this act free from capital puniſhment; yet it
" ſhall be leiſum to the criminal judge, with advice
" of the council, to fine in his means, to the uſe of
" the defunct's wife and bairns, or neareſt of kin,
" or to impriſon him. And his Majeſty, with ad-
" vice foreſaid, declares, that all deciſions given con-
" form to this act, ſince the thirteenth of February
" one thouſand ſix hundred and forty-nine years,
" ſhall be as ſufficient to ſecure all parties intereſted,
" as if this preſent act had been of that date: And
" that all caſes to be decided by any judges of this
" kingdom, in relation to caſual homicide in defence,
" committed at any time heretofore, ſhall be decided
" as is above expreſſed.

Curia

Curia Juſticiaria S. D. N. *Regis tenta, in novo Seſſionis domo Burgi de* Edinburgh, *primo die menſis* Auguſti, *milleſimo ſeptingenteſimo vigeſimo octavo, per honorabiles viros* Adamum Cockburne *de* Ormiſtoun, *Juſticiarium clericum*; *Dominos* Jacobum Mackenzie *de* Royſtoun, *et* Gulielmum Calderwood *de* Poltoun, *Magiſtrum* Davidem Erſkine *de* Dun, *Dominum* Gualterum Pringle *de* Newhall, *et Magiſtrum* Andream Fletcher *de* Miltoun, *Commiſſionarios juſticiariae dict.* S. D. N. *Regis.*

Curia legitime affirmata

INTRAN.

James Carnegie of Finhaven, Pannel.

Indicted and accuſed *ut in die praecedenti.*

" THE Lords Juſtice-Clerk and Commiſſioners of " Juſticiary, having conſidered the indictment, " raiſed at the inſtance of *Suſanna* Counteſs of *Strath-* " *more*, and Mr *James Lyon*, Brother-german and " neareſt of kin to the deceaſt *Charles* Earl of *Strath-* " *more*, with concourſe and at the inſtance of *Dun-* " *can Forbes* Eſquire his Majeſty's advocate, for his " Highneſs's intereſt, againſt *James Carnegie of Fin-* " *haven*, Pannel, with the foregoing debate there- " upon: they fand, and hereby find, that the Pan- " nel, at the time and place libelled, having by " premeditation and forethought felony, with a " ſword or other mortal weapon, wounded the " deceaſt *Charles* Earl of *Strathmore*, of which " wound he the ſaid Earl ſoon thereafter died, or " that

" that he the Pannel was art and part thereof, rele-
" vant to infer the pains of law, but allowed, and
" hereby allow the Pannel, to prove all facts and
" circumſtances he can, for taking off the aggra-
" vating circumſtances of forethought and preme-
" ditation: As alſo fand, and hereby find, That he
" the ſaid Pannel, time and place foreſaid, having,
" with a ſword or other mortal weapon, wounded
" the ſaid deceaſt Earl, of which wound his Lord-
" ſhip ſoon died, or that he the Pannel was art and
" part thereof, *ſeparatim*, relevant to infer the pains
" of law: And repelled, and hereby repell the de-
" fences proponed for the Pannel: And remitted,
" and hereby remit him, and the indictment, as
" found relevant, to the knowledge of an aſſize.

AD. COCKBURNE I. P. D.

The Lords Juſtice-clerk and Commiſſioners of Juſticiary continued the diet, at the inſtance of *Suſanna* Counteſs of *Strathmore*, and others, againſt *James Carnegie* of *Finhaven*, Pannel, till to-morrow, at nine of the clock in the morning; and ordained witneſſes and aſſizers to attend at that time, each perſon under the pain of law; and ordained the Pannel to be carried back to priſon.

Curia Juſticiaria, S. D. N. *Regis*, *tenta in novo Seſſionis domo Burgi de* Edinburgh, *ſecundo die menſis Auguſti*, *milleſimo ſeptingenteſimo vigeſimo octavo*, *per honorabiles viros* Adamum Cockburn *de* Ormiſtoun, *Juſticiarium clericum*; *Dominum* GULIELMUM CALDERWOOD *de* Poltoun; *Magiſtrum* DAVIDEM ERSKINE *de* Dun, *Dominum* Gualterum Pringle *de* Newhall, *et Magiſtrum* Andream Fletcher *de* Miltoun, *Commiſſionarios Juſticiariae dict.* S. D. N. *Regis*.

Curia legitime affirmata.

INTRAN.

James Carnegie of *Finhaven*, Pannel.

Indicted and accuſed *ut in diebus praecedentibus.*

The Lords proceeded to make choice of the following aſſizers.

ASSIZE.

Sir *Robert Dickſon* of *Inveraſk*,
George Loch of *Drylaw*,
* *John Watſon* of *Murrays*,
Walter Riddel of *Granton*,
George Warrender of *Burntsfield*,
Thomas Brown of *Bonington*,
* *George Haliburton* of *Fordel*,
James Balfour of *Pilrig*,
Robert Dundas Merchant in Edinburgh,
David Inglis Merchant there,
David Baird Merchant there,
Alexander Blackwood Merchant there,
* *John Couts* Merchant there,
John Steven Merchaut there,
James Ker Goldſmith there,

N. B. Thoſe of the Jury marked thus * proteſted againſt the Verdict.

The

The above aſſize being all lawfully ſworn, and no lawful objection in the contrary, the Purſuers, for probation, adduced the witneſſes after deponing, *viz.*

ROBERT HEPBURN Hammerman in *Forfar*, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That he was in the Town of *Forfar*, the ninth day of *May* laſt, betwixt the hours of eight and nine o'clock at night, where he did ſee the deceaſt Earl of *Strathmore*, Lord *Roſehill*, and Mr Thomas Lyon my Lord *Strathmore*'s brother, walking in the ſtreets; and at the ſame time did ſee Lyon of *Bridgeton*, and *Finhaven* the Pannel, ſtanding near to the Lady *Auchterhouſe* her houſe, upon the ſtreet; what words paſſed betwixt them, he being at a diſtance, could not hear; ſaw *Bridgeton* give *Finhaven* a puſh with his hand; and *Finhaven*, fell in the gutter, and he ſaw a ſervant of the deceaſt Earl of *Strathmore* help *Finhaven* up out of the gutter; and when *Finhaven* got up, he ſaw him draw his ſword immediately; but that *Bridgeton* coming up faſter than *Finhaven*, he ſaw *Bridgeton* offer to draw my Lord *Strathmore*'s ſword; but does not know whether he got it drawn, or not, but ſaw *Finhaven* draw his ſword before *Bridgeton* offered to draw my Lord *Starthmore*'s; and when *Bridgeton* was coming up from the place where *Finhaven* fell, he looked over his ſhoulder, and ſeeing *Finhaven* with his ſword drawn, he went faſter up to my Lord *Strathmore*, as ſaid is; and when *Finhaven* came up, my Lord *Strathmore* being ſtanding about a pair of butts from the place where *Finhaven* fell, and when *Bridgeton* came up, and endeavoured to draw my Lord *Strathmore*'s ſword, as ſaid is, my Lord turned him about, and ſet *Bridgeton* aſide, and made ſome ſteps towards *Finhaven*, who would be at that time about ſix or eight ells from my Lord; and he did ſee my Lord endeavour to take *Finhaven* in his arms when they met, and a in little after that, that he did ſee my Lord

withdraw himſelf aſide from the reſt of the company, and ſaw him put down his breeches, and lift up his ſhirt, and heard him ſay he had got a wound, and repeated theſe words three times, and ſaw him put up his ſhirt, and in a ſhort time thereafter ſaw my Lord fall to the ground. And being interrogate, If he ſaw *Finhaven* the Pannel make a thruſt at my Lord *Strathmore* with a ſword? *Deponed* he did not ſee him make the thruſt, but at that time he did ſee no other ſword drawn but *Finhaven's*; and after my Lord retired, he ſaw ſeveral other ſwords drawn. *Deponed*, That there was no other company ſtanding with my Lord but my Lord *Roſehill*, and his own brother Mr Thomas, before that *Bridgeton* and *Finhaven* came up: And that he ſaw all this that he has deponed upon, from his own ſhop-door, which was about ſeven or eight ells diſtance from that part of the ſtreet where my Lord *Strathmore* was ſtanding. And being interrogate, If he knows what came of *Bridgeton* after he came up to my Lord? *deponed*, That he knew not what became of *Bridgeton* after my Lord put him aſide: And that there was as much day-light as he could ſee what he has deponed upon: And that *Finhaven* the Pannel was in boots; and that he was coming faſt up after *Bridgeton*, but *Bridgeton* went faſter towards my Lord; and that when my Lord *Strathmore* fell, he ſaw Thomas Adam maltman take up my Lord from the ground, and ſaw no other body aſſiſting. *Deponed* he ſaw the Pannel's ſword twiſted out of his hand by Mr Thomas, or my Lord *Roſehill*; but which of them, he knows not; and that it was after my Lord fell. And *deponed*, That he did ſee the wound in my Lord's belly, a little below the navel; and that it was blooding. *Deponed*, That he ſaw *Finhaven*, after his ſword was twiſted out of his hand, walk in his ordinary way of walking, towards the Lady *Auchterhouſe* her houſe.

Cauſa

Cauſa ſcientiæ patet. And this is the truth as he ſhould anſwer to GOD.

Robert Hepburn.
AD COCKBURNE.

Nota, The Procurators for the Pannel having (before purging) objected to the above named *Robert Hepburn*, why he ought not to be a witneſs in this caſe; becauſe, ſince his citation to be a Witneſs, he had expreſſed malice and ill-will againſt the Pannel in thir words, *viz.* "That he thanked "GOD, he had now an opportunity to hang "him, and would do it if he could:" And ſeeing theſe expreſſions were clearly proven againſt him, by two concurring witneſſes, in preſence of the Court and jury, they deſired the ſame might be ſo marked in the Books of Adjournal. Which, and this depoſition, the Lords left to the conſideration of the Jury.

DAVID Lord *Roſebill*, ſolemnly ſworn, purged, examined and interrogate, *deponed*, (being interrogate for the Pannel) That the time libelled, the Deponent, on the occaſion of a burying, was brought in company with the deceaſt Earl of *Strathmore*, the Pannel, and others; and together they dined in Mr Carnegie of *Lours*'s houſe; and after dinner and the burying was over, they together went to the houſe of Mr Dickſon Clerk of *Forfar*, where they continued ſome conſiderable time, drinking a glaſs of wine together; and after they left that houſe, they aſſembled in the houſe of my Lady *Auchterhouſe*, in the ſame town, the Pannel's ſiſter, where the deceaſt Earl had gone to make a viſit. *Deponed*, That during all that day, and in the ſeveral places, where the deceaſt Earl, the Pannel, and the reſt of the company were, he the Deponent, obſerved nothing, but great civility

civility and friendſhip betwixt the deceaſt Earl and the Pannel. *Deponed*, That before they parted from the Lady *Auchterhouſes*'s, the Pannel appeared to the Deponent to be drunk, and far gone in drink, to the degree of ſtaggering; and he obſerved the Pannel drink plentifully in theſe ſeveral houſes. *Deponed*, That he the Deponent during the time of his being with the ſaid company, was moſtly engaged in converſation with the deceaſt Earl, and had not the occaſion to obſerve what paſſed in converſation betwixt the pannel and Mr Lyon of *Bridgeton*: And being interrogate, about what he knew of the character and temper of the Pannel? *Deponed*, That, according to the Deponent's knowledge of him, which had been of long continuance, and particularly according to the character he the Pannel bore in the country, he was thought to be nowiſe quarrelſome in his temper, but to be of a peaceable and good diſpoſition. *Cauſa ſcientiæ patet*. And this was the truth as he ſhould anſwer to GOD.

Roſehill.
DA. ERSKINE.

WILLIAM DOUGLAS, lawful Son to William Douglas, late Provoſt and Chirurgeon-Apothecary in Forfar, ſolemnly ſworn, purged examined and interrogate for the Purſuers, *deponed*, That on that day whereon the deceaſt Earl of *Strathmore* was wounded, he the Deponent was at Forfar, and on the ſtreets, where he did ſee the Earl with my Lord Roſehill and Mr Thomas Lyon his brother, and at the ſame time, he obſerved *Finhaven* and Mr Lyon of *Bridgeton* ſtanding together, near to the Lady Auchterhouſe her lodging; and ſoon thereafter looking about, he obſerved *Finhaven* leaning and falling backwards into a kennel; and after getting out of it, which he appeared to the Deponent to do very

very ſoon, he drew his ſword, and with it went up to the company, where the Earl, *Bridgeton*, and the reſt were; and at the firſt ſight, upon the Pannel's approaching to the Earl, *Bridgeton* and the reſt, *Bridgeton* was then interpoſed 'twixt the Earl and the Pannel; but all of a ſudden and a clap, the Earl came to be interpoſed betwixt *Bridgeton* and the Pannel; and at the time of the ſaid Earl's interpoſition, the Pannel was within the length of his ſword of the place where *Bridgeton* was ſtanding; that is to ſay, had been ſtanding. *Deponed*, That he did obſerve the Pannel make a thruſt with his ſword, and at the time of ſo doing, the Earl was ſtanding next the Pannel, and his face towards him. *Deponed*, That the Earl received a wound in his belly, and after receiving it, he ſaw him pull his ſhirt from under his breeches, and at the ſame time ſaw him blooding, and ſoon thereafter his Lordſhip fell down, and he heard him ſay that he had got it; and before the Earl fell, and while he was upon the ground, he did obſerve his brother Mr Thomas, with his drawn ſword, twiſt *Finhaven's* ſword out of his hand, after ſeeing and hearing ſome claſhing of their ſwords: But at the time when *Finhaven* made the puſh as ſaid is, he obſerved no other ſword drawn but *Finhaven's*; and at the time when the Pannel recovered his thruſt, the Pannel and the Earl were very near one another: And allt his time, the Deponent was about the length of this room, or ſome more, diſtant from the ſaid Earl and the Pannel, whoſe ſides were oppoſite to the deponent; and after the Earl of *Strathmore's* fall, and that his Brother Mr Thomas twiſted the ſword out of the Pannel's hand, the Pannel, who was in boots, ran towards his Siſter's door: After the deceaſt Earl was carried to a houſe, and his wound was dreſt, he heard his Lordſhip ſay, that after the ſword entred his belly, he the Pannel gave it a ſecond thruſt. Deponed, That when he obſerved *Finhaven* falling into the the puddle, as above ſaid, there was none

ſtanding

ſtanding with him or by him, but Mr *Lyon* of *Bridgton.* And what he has above deponed, happened on the ninth day of *May* laſt, about the hour of Nine at night. *Cauſa ſcientiæ patet.* And this was truth as he ſhould anſwer to GOD.

Will. Douglas
DA. ERSKINE.

ANDREW DOUGLAS, alſo lawful ſon to the ſaid William Douglas, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That the time and place libelled, the Deponent ſaw *John Lyon* of *Bridgeton*, puſh the Pannel upon the breaſt, whereby the Pannel fell in the gutter, which the Deponent apprehended would have taken him up to the knee; that it was a very naſty gutter; and that he ſaw the Pannel ariſe out of the gutter, and immediately draw his ſword, by which time *Bridgeton* was walking off towards my Lord *Strathmore* and others, who were ſtanding upon the ſtreet, about the diſtance of the length of this room from the foreſaid gutter: And deponed, That he followed after *Finhaven* immediately, after ſtanding a little while with his comerades; and that before the Deponent came up to the place where my Lord *Strathmore* and the other gentlemen were ſtanding, my Lord *Strathmore* had fallen upon the ſtreet. And the Deponent being aſk'd, how ſoon that happened? deponed, That it was in a moment; and that when the Deponent came up as foreſaid, he ſaw Mr Thomas Lyon and *Finhaven* engaged, and making paſſes at other with their drawn ſwords; which the Deponent explained to be only a claſhing with their ſwords; and that Mr Thomas Lyon did very ſoon twiſt the ſword out of *Finhaven*'s hand; whereupon *Finhaven* run away to his ſiſter's, the Lady *Auchterhouſe*'s lodging, and the door was ſhut after him.

him. *Cauſa ſcientiæ patet.* And this was the truth as he ſhould anſwer to GOD.

Andrew Douglas.
AND. FLETCHER.

JOHN FERRIER reſidenter in Forfar, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That, at the time and place libelled, the Deponent having occaſion to go to water his maſter's horſe, he ſaw *Bridgeton* and the Pannel, as they came out from the Lady *Auchterhouſe*'s lodging, about the bridge-ſtone near the ſhambles, and there heard *Bridgeton* ſay to the Pannel, You muſt give me an anſwer to my queſtion, which the Deponent heard was, If the Pannel would give his daughter to the Lord Roſehill: And upon the Pannel's ſaying, No, *Bridgeton* aſked him, if he would drink a bottle of wine? and if he would drink the King's health? And upon the Pannel's refuſing to do either, the Deponent ſaw *Bridgeton* take hold of the Pannel by the breaſt, and violently puſh him into the kennel; and heard *Bridgeton* at the ſame time ſay, Go and be damn'd and your King George whom you love ſo well. And thereafter *Bridgeton* walked towards my Lord *Strathmore*, Mr Thomas Lyon, and my Lord Roſehill, who were ſtanding upon the ſtreet, at ſome little diſtance; and that *Finhaven* was help'd out of the gutter by a footman of my Lord *Strathmore*'s: And that, upon the Pannel's getting upon the ſtreets again, he immediately drew his ſword, and ran up the ſtreet after *Bridgeton*; and before *Bridgeton* had come the length of the place where the Lord *Strathmore* and the others were ſtanding, he looked over his ſhoulder, and ſeeing *Finhaven* following him in manner above mentioned, he run up to my Lord *Strathmore*, who, and the reſt of the company, had ſtill their backs turned to the place from whence *Finhaven* and *Bridgeton* were

were coming: And that *Bridgeton*, upon his coming up to *Strathmore*, laid hold upon my Lord *Strathmore*'s ſword, and endeavoured to pull it out; upon which my Lord *Strathmore* turning about, puſhed *Bridgeton* off, and in the mean time *Finhaven* made a puſh with the ſword at *Bridgeton*, and at that inſtant he obſerved my Lord *Strathmore* puſhing *Brigdeton* aſide, and make a ſtep towards *Finhaven*, and obſerved at the ſame time *Finhaven*, going on with his puſh, to ſtagger forward with the thruſt upon my Lord *Strathmore*; and thereafter the company went all through, other ſo that the Deponent could not ſee where the thruſt landed: And very ſoon thereafter the Deponent ſaw Mr Thomas Lyon with his ſword ca' *Finhaven*'s ſword out of his hand, which lighted at a good diſtance upon the ſtreet: Upon which *Finhaven* run off, ſtaggering, towards the Lady *Auchterhouſes*'s lodging, and had almoſt fallen upon the ſtreet before he got in at the gate; and much about the ſame time the Deponent ſaw the Earl of *Strathmore* fall down upon the ſtreet, and afterwards carried off, and that Thomas Adam and Janet Binnie were the firſt that came to his aſſiſtance. Deponed, That the kennel was deep and dirty, and that the Pannel was deep in it, but not freely covered: That when he aroſe, his face was almoſt as black as his black coat, and that while theſe things paſt, the Deponent was riding upon the ſide of the ſtreet, betwixt the gutter and the place where the Earl of *Strathmore* and others were ſtanding; and upon ſeeing the beginning of this accident, he ſtopped his horſe a little, till he ſaw as above mentioned. *Cauſa ſcientiæ patet.* And this was the truth as he ſhould anſwer to God.

John Ferrier,
AND. FLETCHER.

DAVID

DAVID BARCLAY, lawful Son to David Barclay Brewer in Forfar, ſolemnly ſworn, purged, examined and interrogate, *deponed*, that at the time and place libelled he ſaw *Bridgeton* puſh the Pannel into a gutter, and ſaw a ſervant raiſe him out of the gutter: And when the Pannel got to the ſtreet, he ſaw him draw his ſword, and go towards the reſt of the company, and *Bridgeton* was beyond the Earl of *Strathmore*, his brother and Lord *Roſehill*, who were interpoſed betwixt the Pannel and *Bridgeton*, and did not ſee the Pannel puſh with the ſword, and ſaw a little after my Lord *Strathmore* fall upon the ſtreet; and immediately after that ſaw Mr *Thomas Lyon*, with a naked ſword, beat the Pannel's ſword out of his hand, and the Pannel immediately run toward the Lady *Auchterhouſe*'s houſe, and got in at the door. And *deponed*, that when *Bridgeton* thruſt the Pannel into the gutter, the ſervant who lifted him up, ſaid to *Bridgeton*, or ſome other ſervant ſtanding by, that he was uncivil, though he was a gentleman: And that what the deponent ſaw and heard, as aforeſaid, was betwixt eight and nine o'clock of the evening of the day foreſaid. *Cauſa ſcientiae patet.* And this was the truth as he ſhould anſwer to GOD.

David Barclay.
W. CALDERWOOD.

ELISABETH BINNIE, ſpouſe to Andrew Gray Baxter in Dundee, ſolemnly ſworn, purged, examined and interrogate, *deponed*, that the time and place libelled ſhe ſaw *John Lyon* of *Bridgeton* give a puſh to the Pannel, whereby he fell in the gutter, and was raiſed out of it by the Lord *Strathmore*'s ſervant; and when he got to the ſtreet, ſaw him draw his ſword, and heard him utter an oath, but did not know what the words were: And then the Deponent

turned her back, and did not ſee *Finhaven* puſh with the ſword. *Cauſa ſcientiæ patet.* And this was the truth as ſhe ſhould anſwer to God: and declared ſhe could not write.

W. CALDERWOOD.

JOHN MACKY, ſervant to Mr *Robert Nairn*, brother-german to ——— *Nairn* of *Drumkilbo*, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That at the time and place libelled he did ſee *William Macgliſh*, my Lord *Strathmore*'s ſervant, take *Finhaven* the Pannel out of the gutter where the deponent ſaw him ly; and did ſee *Finhaven* draw his ſword after he was out: And did hear one of the gentlemen, ſtanding in the place where my Lord *Strathmore* was wounded, call out to *Finhaven*, Stand off Sir; and a little ſpace thereafter he ſaw the deceaſt Earl of *Strathmore* taken up. *Cauſa ſcientiæ patet.* And this is the truth as he ſhould anſwer to God; and *deponed* he could not write. WA. PRINGLE.

JAMES BARRIE, ſervant to *James Carnegie* of *Finhaven*, ſolemnly ſworn, purged, examined and interrogate, *deponed*, that, at the time and place libeled, the deponent was holding his maſter's horſes upon the ſtreets of *Forfar*, near to the Lady *Auchterhouſe*'s lodging: That he had ſeen the ſaid Earl of *Strathmore* and other company with him, go along the ſtreet from the ſaid lodging, and his maſter and *Bridgeton* followed at a little diſtance, heard them converſing together, and thought that *Bridgeton* lookt and ſpoke angry at his maſter, and demanded that he ſhould give him an anſwer; did not well hear what his maſter ſaid, except theſe words, that he intended to be of that reſolution ſtill: Whereupon *Bridgeton*, with his two hands, puſhed his maſter into the gutter,

gutter, at the ſame time expreſſing himſelf, Go be damn'd, and let that man take him up for whom he had ſo great a favour. And the deponent ſeeing his maſter lying in the gutter, quit his horſes and came to relieve him, but found that my Lord *Strathmore*'s ſervant had helped him out before he came, and then he did ſee his maſter draw his ſword, and go pretty faſt forward, ſtaggering, and ſaying, This cannot be ſuffered; then his maſter came up to the company, and ſaw him make a puſh at *Bridgeton*; but that before his maſter came up to them, he did ſee *Bridgeton* make an attempt to draw my Lord *Strathmore*'s ſword; and as *Bridgeton* was going toward my Lord *Strathmore*, he did ſee *Bridgeton* look over his ſhoulder to *Finhaven*, and lookt as if he had been laughing. Obſerved that when his maſter made the puſh, as before mentioned, he ſeemed as if he'd been falling, and ſaw him cloſe upon Lord *Strathmore*: But before this, my Lord *Strathmore* had put *Bridgeton* aſide, and my Lord *Strathmore* had advanced a ſtep or half a ſtep towards *Finhaven*; and then they went all in a crowd thro' other, and he did not know what was doing amongſt them, but did ſee his maſter's ſword ſtruck out of his hand by another ſword, and then did ſee his maſter go down to his ſiſter's lodging. *Deponed*, That as his maſter was thrown upon the back in the gutter, and was covered near over the belly, and ſaw his face all beſpattered with dirt, and ſaw the mire run out of his boot-tops as he went up the ſtreet; and *deponed* his maſter at that time was very drunk. Being interrogate further, *deponed*, That he has frequently ſeen his maſter drink, and propoſe the deceaſed Earl of *Strathmore*'s health at his table, and this a ſhort time before the unlucky accident happened. *Deponed*, That, about a month before, the late Earl and his maſter was together at *Burnſide*'s burial, and heard the Earl invite his maſter to his houſe, and heard

heard him anſwer, that he intended that very ſoon. *Deponed*, that his maſter rode with piſtols that day, but *deponed* there was not ſo much as a ſtone in them. *Deponed*, that eight or ten days before this unlucky accident, his maſter bid the deponent go to the Taylor, and get his cloaths ready, for he intended as ſoon as he got his chaiſe home, to go with his Lady and make a viſit to my Lord *Strathmore* at *Glammis*. *Cauſa ſcientiæ patet*. And this is the truth as he ſhould anſwer to God.

James Barrie.
WA. PRINGLE.

ELISABETH VILANT, ſervant to *Margaret Carnegie*, relict of the deceaſt Mr *Patrick Lyon* of *Auchterhouſe*, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That, on the afternoon of the ninth of *May* laſt, ſhe did ſee my Lord *Strathmore* and *Finhaven* in the Lady *Auchterhouſe*'s houſe, and did ſee nor hear nothing paſs between them but what was kind and civil, and ſhe was much of the time in the room before *Bridgeton* came in; But after he came in, ſhe was but coming and going; and when my Lady called for a glaſs of brandy, the deponent brought it in, and my Lady ſet it by, and ſaw no body drink it, and that my Lady told in the company, That *Bridgeton* had taken her by the wriſt, and that ſhe had not been ſo ill uſed by any man, and complained of pain. And *deponed*, That that afternoon *Finhaven* appeared to be very drunk. *Cauſa ſcientiæ patet*. And this is the truth as ſhe ſhould anſwer to God.

Elizabeth Vilant.
AD. COCKBURNE.

ISABEL

ISABEL MEIK, ſervant to the before named and deſigned Margaret Carnegie, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That, in the evening on the ninth of May laſt, *Finhaven* came up to the Lady *Auchterhouſe*'s houſe; and the door being ſhut after him, ſhe came up after into the ſaid houſe: And ſhe turning about upon ſome people knocking at the door, and opening the ſame, there came in two or three Noblemen or Gentlemen with drawn ſwords; and *Finhaven* being then in the trance, ſhe took him by the ſleeve, and put him in the peat-houſe, and lock't the door of the peat-houſe; and when the Bailie came in ſearch of him, ſhe delivered the key to the Bailie, who took him out. And *deponed*, That *Finhaven* was mortally drunk, and when ſhe ſaw him, he was all beſpattered with dirt. *Cauſa ſcientiæ patet.* And this is the truth as ſhe ſhould anſwer to GOD. And *deponed* ſhe could not write.

AD. COCKBURNE.

WILLIAM DICKSON Shoemaker in *Forfar*, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That, the time and place libelled, the deponent being at his own ſtair-foot, ſaw two gentlemen ſtanding together whom he then did not know, and one of them did throw the other in the puddle, and that gentleman who was thrown in the puddle was taken forth thereof by another whom he did not know: And when he got up, he drew his ſword, and went up towards other three that were ſtanding together, and the gentleman who threw him in the puddle was nigh them; he did not ſee the ſaid gentleman puſh with his ſword at any. *Deponed*, That my Lord *Strathmore* was one of the three that was ſtanding there, did not ſee him fall, but ſaw him carried

carried away. *Deponed*, That after the mob roſe, he then ſaw *Finhaven* the Pannel, whom he knew to be the gentleman that was thrown in the puddle, and that he was chaſed back by two gentlemen with drawn ſwords to my Lady *Auchterhouſe*'s houſe. *Cauſa ſcientiæ patet.* And this is truth as he ſhould anſwer to GOD; and cannot write.

W. CALDERWOOD.

DAVID CAUTY, merchant and one of the Bailies of *Forfar*, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That, upon the ninth of *May* laſt, about nine o'clock in the evening, the deponent being in a houſe near to the Lady *Auchterhouſe*'s lodgings, there came a ſervant, and told that there was very bad news that night, That the Earl of *Strathmore* was killed by *Finhaven*: Upon which the deponent went to the ſtreets, and there found a great mob, who told the ſame which he had heard before. Whereupon the deponent went towards Mr Dickſon's houſe, to which place the Earl of *Strathmore* was carried; and then the deponent met with, at leaſt did ſee, Mr Thomas Lyon and *Bridgeton*, but cannot be ſure if my Lord *Roſehill* was with them, who went towards the Lady *Anchterhouſe*'s lodgings: And Mr Fletcher of *Balinſhow* told the deponent, That he wanted a fore hammer, to break open the Lady *Auchterhouſe*'s door; whereupon the Deponent being a Magiſtrate, told, that it was his duty to preſerve the peace, and prevent any illegal proceedings or bad conſequences therefrom. Thereafter the deponent went towards my Lady *Auchterhouſe*'s lodgings, and there found Mr Thomas Lyon and *Bridgeton*, and demanded their arms, which they delivered to the deponent; and thereafter went to the ſaid lodgings, got acceſs, my Lady *Auchterhouſe*'s ſervant delivering the key of the peat-houſe, where he found

Finhaven

Finhaven lying upon lint ſpread above the peats, notwithſtanding at firſt the Lady and her ſervants denied he was there; and the deponent told *Finhaven*, he was his priſoner; and he aſked the deponent, how the Earl of *Strathmore* was? and the deponent told, he was very bad, as he was informed. And the deponent having diſperſed the mob, cauſed carry *Finhaven* to the priſon; and when he came to priſon, he fell a crying to a great extremity, as if he had been diſtracted, and ſaid, It was the greateſt misfortune that could happen him, and ſaid, that he deſerved to be hanged for wounding ſuch a worthy Earl: And *deponed*, That *Finhaven* appeared to the deponent to be in liquor, and drunk; but he did regret his misfortune in the ſame manner as if he had been ſober. *Deponed*, That he was frequently in priſon with *Finhaven*, and in two or three days after he was impriſoned, he heard him ſay, That there had been ſome grudge or miſunderſtanding betwixt the Earl of *Strathmore* and him, but that afterwards it was better cultivate, and in a manner done away; but did not hear the cauſe of the ſaid grudge or miſunderſtanding expreſt. *Deponed*, That when he heard *Finhaven* regret the misfortune that had happened the Earl of *Strathmore*, he ſaid the deſign was againſt another, namely, Lyon of *Bridgeton*. *Cauſa ſcientiæ patet.* And this is the truth as he ſhould anſwer to GOD.

David Cauty.
W. CALDERWOOD.

ALEXANDER BINNIE, Provoſt of *Forfar*, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That while the Pannel was in priſon within the Tolbooth of *Forfar*, he the deponent did frequently viſit him, and he did hear *Finhaven* ſay, That there had been ſome miſtakes and miſunderſtandings

derſtandings betwixt him and my Lord *Strathmore*, on account of a Proceſs of Baſtardy that was depending before the Lords of Seſſion, but did not hear him ſpeak as if he was under any grudge or reſentment on that account. *Deponed*, That, about a month before the ſaid Earl's death, he the deponent was occaſionally at a burial with the ſaid deceaſt Earl and the Pannel, betwixt whom the deponent obſerved nothing like miſunderſtanding, but that their carriage to one another was civil; and particularly remembers, that at that time *Finhaven* drunk a glaſs to the health of the Counteſs of *Strathmore*, and after drinking, threw up the glaſs, which broke with its fall; and this happened in the houſe of Clerk *Dickſon* in *Forfar*: And when the Earl of *Strathmore* went to take his horſe, the Pannel and the deponent waited of him. And being interrogate, If on that day he heard the Earl of *Strathmore* invite the Pannel to viſit him? *deponed negativè*; and, from a letter put into the Clerk's hands, apprehends that they were not in a courſe of viſiting. *Cauſa ſcientiæ patet.* And this is the truth as he ſhould anſwer to GOD.

Alex. Binnie.
DA. ERSKINE.

Follows the letter relative to the above depoſition.

SIR,

" WE propoſe to have an meeting at your houſe
" on Tueſday next, to finiſh that affair of Mr
" Martine's; wherefore, if your conveniency could
" allow, I wiſh you would make an viſit to my Lord
" *Strathmore*, to ſatisfy him, and that he may ſend
" one mandate, ſo as that every thing may go on as

was

" was propoſed. Your anſwer is expected by, Sir,
your moſt humble ſervant,
JA. CARNEGIE.

Finhaven, third May, one thouſand ſeven hundred and twenty eight.

" Directed on the Back thus,"
To Provoſt " Alexander Binnie
" in Forfar.

Edinburgh, ſecond of Auguſt one thouſand ſeven hundred and twenty eight, This is the letter to which Alexander Binnie Provoſt of Forfar his depoſition of this date relates.

AD. COCKBURNE.

CHARLES CARNEGIE, Brother-german to Patrick Carnegie of Lours, ſolemnly ſworn, purged, examined, and interrogate, *deponed*, That he knew, that that there was not a very good underſtanding betwixt the deceaſt Earl of *Strathmore* and the Pannel, and for the ſpace of two years, they had not viſited one another; but he never did hear the Pannel expreſs any grudge or reſentment againſt my Lord *Strathmore*. Did hear that about two years ago or thereabouts, there fell out ſome miſtakes in diſcourſing about a bargain of meal; and that the Pannel was, as he heard, that night at Glammis, but went away next morning about four o-clock; but he the Deponent was not preſent with them at ſaid time; but did hear, that what happened betwixt them at that time, gave riſe to ſome miſunderſtandings. *Cauſa ſcientiæ patet*. And this is the truth as he ſhould anſwer to GOD.

Charles Carnegie.
DA ERSKINE.

SIR *Alexander Wedderburn* of Blackneſs, ſolemnly ſworn, purged, examined and interrogate, *Deponed*, That about the end of October one thouſand ſeven hundred and twenty ſix, there was a meeting of the gentlemen of the ſhire of Angus, concerning their affairs, in the town of Forfar, where the deceaſt Earl of *Strathmore* was choſen Preſes of the meeting; and that the Laird of *Finhaven*, who was there alſo, called down the deponent to the ſtreet, and expreſt himſelf to this purpoſe; That he had met with ſeveral diſobligations from the Earl of *Strathmore*, of which there was juſt now an inſtance, That the Earl being Preſes of the meeting, had kept him out of a committee that was then choſen; That the Earl was his debitor, and was owing him ſeveral years annualrents; That he did not much notice, but that he would reſent, or make the Earl repent what he had met with, or words to that purpoſe: And this he ſaid with an aſſeveration, and deſired the Deponent to acquaint the Earl with what he had ſaid: But the Deponent refuſed it, and ſaid they were all friends together, and he would forget it againſt to-morrow. And deponed, That he the Deponent, that ſame night did ſpeak to my Lord Gray, to ſpeak to my Lord *Strathmore*, to get *Finhaven* added to the committee, ſaying, that would make all things right: but my Lord *Gray* returned no anſwer to the Deponent. *Cauſa ſcientiæ patet.* And this is the truth as he ſhould anſwer to GOD.

Alex. Wedderburn.
WA. PRINGLE.

WILLIAM DOUGLAS, late Provoſt and Chirurgeon-apothecary in Forfar, ſolemnly ſworn, purged, examined and interrogate, *deponed*, That upon the ninth of May laſt at nine o-clock at night, the Deponent was called to the Earl of *Strathmore*, who had got a wound; and having panſed and dreſſed the wound

wound, he found it went in about three inches and a half above the navel, and came out to the back bone, about two inches below; that he firſt dreſt the wound in the belly, and then that in the back; that the Earl having aſked his opinion of it, he ſaid he was not without great hazard, and deſired more aſſiſtance; whereupon an expreſs was diſpatched to Dundee for phyſicians; that the deponent thought the wound mortal, and did not think any could recover of that wound; the Earl lived about forty nine hours thereafter, and died upon the Saturday's night at ten o-clock of the foreſaid wound. *Deponed*, That the Earl ſaid to him, that *Finhaven* had given him that wound, and that after he gave the firſt thruſt, he preſſed the pomel of the ſword forward with his breaſt; and that it was the Deponent's opinion from what he obſerved, whatever ſword had given that wound, was either ruſty or had a nitch in, which brought out the *Omentum* without the belly; and the deponent afterward having ſeen the ſword, which was called *Finhaven*'s ſword, he perceived a nitch in it, ſome more than a hand-brode from the hilt. *Cauſa ſcientiæ patet.* And this is the truth as he ſhould anſwer to GOD.

William Douglas.
WA. PRINGLE.

THOMAS CRICHTON Chirurgeon Apothecary in Dundee, ſolemnly ſworn, purged, examined and interrogate, *Deponed*, That upon the evening of the ninth of May laſt, the Deponent was ſent for from Dundee, to wait on the now deceaſt Earl of *Strathmore*, and arrived at Forfar next morning about one o'clock, and there ſaw the wound the Earl had received, which appeared to the Deponent to have been by a ſword, which had entered about three inches and a half above the navel, and had gone out at the back, about four inches from the back-bone, a good

good deal lower than where the ſword entered; and the Deponent ſaid the wound was mortal to his apprehenſion; and that the Earl of *Strathmore* die thereof in about two days after the receiving of it. And *deponed*, That the defunct told the Deponent that *Finhaven* had given him that wound; that he did not believe he deſigned it for him, and yet there was one circumſtance which he could not account for, *viz.* That after the ſword had entered his body, *Finhaven* preſſed it forward, till their bodies were cloſe together. *Deponed*, That *Bridgeton* is a good deal taller than my Lord *Strathmore* was: and that my Lord *Strathmore* wore a fair wig, and *Bridgeton* wore a black one uſually. *Cauſa ſcientiæ patet.* And this is truth as he ſhould anſwer to God.

Tho. Crichton.
AND. FLECTHER.

DR *John Wedderburn* Phyſician in Dundee, ſolemnly ſworn, purged, examined and interrogate. Deponed, That he was called to wait on the Earl of *Strathmore*, when he received the wound upon the ninth of May laſt; and the Deponent ſaw him next morning early, and upon viewing the wound, it appeared to the Deponent to have been given by a three-corner'd ſword, which had entered about three inches above the navel, and went out in the back on the left ſide, ſome inches from the backbone, and about two inches lower than where it had entred; and the wound was to the Deponent's apprehenſion mortal; and accordingly the Earl of Strathmore died of that wound upon Saturday's night, about two days after he had received it; and the deponent thereafter ſaw the defunct opened, whereby it appeared, that the weapon had paſſed through the Caul, the Gut-colon, and the *Plexus meſentericus*. And deponed, That the defunct told him, that he had an

an impreſſion that the perſon who gave him the wound, had, by applying his belly to the pomel of the ſword, puſhed it forward upon him. *Deponed*, That *Bridgeton* is of a much taller ſtature, than my Lord *Strathmore* was; and that my Lord *Strathmore* uſually wore a fair wig, and *Bridgeton* a black one; *Cauſa ſcientiæ patet*. And this is the truth as he ſhould anſwer to GOD.

John Wedderburn.
AND. FLETCHER.

DR CHARLES FOTHERINGHAME Phyſician in Dundee, ſolemnly ſworn, purged, examined and interrogate, *deponed* conform to Thomas Crichton, the former witneſs, *in omnibus*. *Cauſa ſcientæ patet*. And this is the truth as he ſhould anſwer to GOD.

Cha. Fotheringhame.
AD. COCKBURNE.

Follows the witneſſes for the Pannel's exculpation.

MARGARET CARNEGIE Lady Auchterhouſe, ſolemnly ſworn, purged, examined and interrogate *ut ſupra*, deponed, that on the afternoon of the 9th of May laſt, the Earl of *Strathmore*, *Bridgeton*, and *Finhaven*, were in the Deponent's houſe; ſhe obſerved no manner of difference betwix the Earl of *Strathmore* and *Finhaven*; and that the Pannel and the other company drunk my Lady *Strathmore*'s health twice over, and the Pannel toſſed up the glaſs; during that time *Bridgeton* was uſing rough expreſſions to the Pannel, and was taking him by the breaſt, and very rude to him; and that when a glaſs of brandy was brought, ſhe deſired *Bridgeton* to take a dram, and he deſired it ſhould be given to *Finhaven* her brother; but ſhe ſaid no, for it did appear to her he did not want it, for he

was

was then very drunk; and that *Bridgeton* took her the Deponent by the wriſt, and ſqueezed it hard, and ſaid it would be no difficulty to break it; and during the ſame time, *Bridgeton* took *Finhaven* by the arm, and ſtruck his hand down to the table, and ſaid, Will ye not agree to give one of your daughters to Roſehill; and *Bridgeton* further ſaid, if he was a young man, and if *Finhaven* refuſed him one of his daughters, he would maul him, and with that ſhook his hand over him. And *deponed*, She never knew nor heard of her brother's being quarrelſome. *Cauſa ſcientiæ patet.* And this is the truth as ſhe ſhould anſwer to GOD.

Margaret Carnegie.
AD. COCKBURNE.

DR *John Kinloch* Phyſician in *Dundee*, ſolemnly ſworn, purged, examined and interrogate *ut ſupra*, *deponed*, That, on the 9th of May laſt, after *Lours*'s daughter's burial, the Deponent was in Clerk *Dickſon*'s houſe in *Forfar*, in a room with the Pannel, who aſked the Deponent, if he would go into another room, where the Earl of *Strathmore* was, to ſee his Lordſhip; and accordingly they went into the room where the Earl was, and ſtayed there about an hour, and drunk ſeveral bottles of wine together; and during that time, he ſaw nothing but mutual civilities in the company, without the leaſt appearance of quarrels. *Cauſa ſcientiæ patet* And this is the truth as he ſhould anſwer to GOD.

John Kinloch.
W. CALDERWOOD.

DAVID DENUNE Sadler in *Canongate*, ſolemnly ſworn, purged, examined and interrogate, *ut ſupra*, *deponed*, That in the end of February, or beginning of March laſt, the deceaſed *Charles* Earl of *Strathmore*, and *Finhaven* the Pannel, with another Gentleman

Gentleman, whom the Deponent did not know, came to the Deponent's houſe, called for a dram, in which the Deponent ſerved them with himſelf; and the Earl firſt drunk to *Finhaven* and his family, and then *Finhaven* drunk the Earl of *Strathmore*'s health and his family's; and at ſeveral other times, when the Earl was not preſent, the Deponent ſaw and heard *Finhaven* drink to the ſaid Earl of *Strathmore*'s health. *Deponed* he has had occaſion often to ſee *Finhaven*, and be in company with him, and obſerved him always to be of a good temper, and no ways inclined to quarrels. *Cauſa ſcientiæ patet*. And this is the truth as he ſhould anſwer to GOD.

David Denune.
W. CALDERWOOD.

DAVID OGILVIE, Son to Sir *John Ogilvie* of *Inverquharrity*, ſolemnly ſworn, purged, examined and interrogate, *ut ſupra*, *deponed*, That he has had frequent occaſions of being in company with the Pannel, and has oft-times heard him teſtify his reſpect and regard for the late Earl of *Strathmore*, by naming and drinking to his health, and particularly, did hear him do ſo at his own houſe, in the month of March or April laſt, when the Deponent was viſiting him; that is to ſay, did hear him drink both to the Earl's health and his Counteſs's. *Deponed*, That for theſe three or four years paſt, he has been intimately acquainted with the Pannel, and obſerved him always to be of a good and peaceable temper; and the character he always heard him get in the country, was, That he was of a peaceable and good temper, and no ways quarrelſome. *Cauſa ſcientiæ patet*. And this is the truth as he ſhould anſwer to GOD.

David Ogilvie.
DA. ERSKINE.

Mr

MR *John Martine* Miniſter of the goſpel at *Othle*, ſolemnly ſworn, purged, examined and interrogate *ut ſupra*, *deponed*, That he the Deponent having had ſome affair to do with the deceaſed Earl of *Strathmore*, as one of the heritors within the Deponent's pariſh, on which account the Deponent went to wait of his Lordſhip at his houſe of Glammis, but had the misfortune to miſs him; and upon his return, having waited of the Pannel, and ſpoke to him of the affair, telling him how he had miſſed my Lord, and deſired that the Pannel would fall upon ſome expedient to bring either his Lordſhip, or ſome from him, to meet with the reſt of the heritors. Upon which the Pannel adviſed the Deponent once more to wait of his Lordſhip at *Glammis*; and for his recommendation and introduction, he would write a letter to the Earl, and acquaint him in it that he was the bearer. Accordingly the Pannel did write a letter to the Earl to the foreſaid purpoſe, which he delivered to the Deponent; and with it he the Deponent did again go to *Glammis*, and at that time alſo had the misfortune to miſs his Lordſhip: Upon which he the Deponent delivered the letter to one Mr *Greenhill* the Earl's ſervant; and the meeting of the Heritors holding upon the Wedneſday thereafter, the ſaid Mr *Greenhill* came from his Lordſhip, and attended the meeting: And *deponed*, That the writing of the foreſaid letter, and delivering of it, was about the end of March, or beginning of April laſt. *Deponed*, That the Deponent has for theſe three years paſt been intimately acquaint with the Pannel; and during the whole courſe of his acquaintance, he obſerved him always to be regular in his life, and of a peaceable temper and diſpoſition, which is the character he bears in the country. *Cauſa ſcientiæ patet*. And this is the truth as he ſhould anſwer to GOD.

John Martine.

DA. ERSKINE.

Mr

MR *James Maxwell* Miniſter of the Goſpel at *Forfar*, ſolemnly ſworn, purged, examined and interrogate *ut ſupra*, *deponed*, That ſoon after the Earl of *Strathmore* received his wound, the Deponent waited of him, and from him he went to the priſon and viſited the Pannel, whom he found in great diſorder, and under the impreſſions of drunkenneſs, his cloaths being all covered with mire, and his face beſmired with dirt; the Deponent helped him to take off his cloaths, and ſent for a coat and ſome linens of his own to put on, at leaſt the coat was his own, which he helped to put on him, and to waſh and clean his face. The Deponent ſpoke to him ſuitably to the occaſion of his viſit, both in reſpect to his drunkenneſs, and what was publiſhed abroad he had committed upon the Earl of *Strathmore*, by giving him a wound; upon hearing whereof, and the Deponent further ſaying, That he had to his great ſatisfaction heard the Earl of *Strathmore* pray to God to forgive him: Upon this the Pannel fell into the greateſt diſorder, toſſing himſelf backwards and forwards upon a table, and hanging his head downwards, cried out, GOOD GOD! have I wounded the Earl of *Strathmore*, a perſon for whom I had great kindneſs, and againſt whom I had no deſign. *Cauſa ſcientiae patet.* And this is the truth as he ſhould anſwer to GOD.

Ja. Maxwell.
DA. ERSKINE.

The Lords Juſtice-clerk and Commiſſioners of Juſticiary, ordained the Aſſize to incloſe inſtantly, and return their verdict, in this place, againſt to-morrow at twelve o'clock, and the haill fifteen to be then preſent, each under the pain of Law, and the Pannel to be carried back to priſon.

Curia Juſticiaria S. D. N. *Regis, tenta in novo Seſſionis domo Burgi de* Edinburgh, *tertio die menſis* Auguſti, *Milleſimo ſeptingenteſimo vigeſimo octavo, per honorabiles Viros* ADAMUM COCKBURNE *de* Ormiſtoun *Juſticiarium Clericum*; *Dominum* GULIELMUM CALDERWOOD *de* Poltoun, *Magiſtrum* DAVIDEM ERSKINE *de* Dun, *Dominum* GUALTERUM PRINGLE *de* Newhall, *& Magiſtrum* ANDREAM FLETCHER *de* Miltoun, *Commiſſionarios Juſticiariae dict.* S. D. N. *Regis.*

Curia legitime affirmata.

INTRAN.

James Carnegie of *Finhaven*, Pannel,

Indicted and accuſed, as in all the former Sederunts.

The foregoing perſons who paſſed upon the Aſſize of the above Pannel, returned their verdict in preſence of the ſaid Lords, and whereof the tenor follows:

" EDINBURGH the Third of *Auguſt* One thou-
" ſand ſeven hundred and twenty eight years,
" the above aſſize having incloſed, did chooſe Sir
" *Robert Dickſon* of *Invereſk* to be their Chancellor,
" and *George Haliburton* of *Fordel* to be their Clerk:
" And having conſidered the indictment purſued at
" the inſtance of *Suſanna* Counteſs of *Strathmore*,
" and Mr *James Lyon*, Brother-german and neareſt
" of kin to the deceaſt *Charles* Earl of *Strathmore*,
" with concourſe, and at the inſtance of *Duncan*
" *Forbes* Eſq; his Majeſty's Advocate, for his High-
neſs's

" neſs's intereſt, againſt *James Carnegie* of *Finhaven*,
" Pannel; the Lords Juſtice-Clerk and Commiſſioners
" of Juſticiary their interlocutor thereupon, with the
" witneſſes depoſitions adduced for proving thereof;
" with the witneſſes depoſitions adduced for the
" Pannel's exculpation: They, by plurality of voices,
" find the Pannel not guilty. In witneſs whereof
" thir preſents are ſubſcribed by our ſaid Chancellor
" and Clerk, in our names, place, day, month and
" year of God above-written.

Ro. Dickson *Chancellor.*
Geo. Haliburton Clerk.

The Lords Juſtice-Clerk and Commiſſioners of Juſticiary, having conſidered the foregoing verdict of aſſize returned againſt James Carnegie of Finhaven *Pannel; They aſſoilzied, and hereby aſſoilzie him* ſimpliciter, *and diſmiſſed, and hereby diſmiſs him from the bar.*

Ad. Cokburne.

FINIS.